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* PROFESSIONAL ETHICS.

Before I begin, I may tell you there are three or four sources from which you can get an outline of what you have to know on questions relating to your professional duties and etiquette. There is an article in the American Cyclopædia, Vol. IV, on "Attorneys;" an article in the English Cyclopædia of Laws, Vol. XI, on "Solicitors." There is a book by Marchant called *Barristers-at-Law* and there is an article in Halsbury's' *Laws of England*, Vol. II, on 'Barristers'—by Marchant and Mr. Bingley who is Secretary to the General Council of the Bar. There is a lot of valuable matter dispersed in a number of other books; I do not think I need trouble you with them.

I propose that we should study together today the duties of an advocate to the court. Now every species of advocate is an officer of the court; although he is also the representative and mouth-piece of his client he owes allegiance to the tribunal whose officer he is, and his duties to that tribunal are not less important than his duties to his client. If an advocate will always bear in mind that he is not merely counsel for his client but also a counsellor to the court, he will then be able to realise the important function of co-operating with the Bench in the administration of justice, and his duty to help the court and to avoid any manner of thwarting the court. In England a Sergeant-at-Law used to be addressed as 'brother' by the judges—a very excellent way of reminding counsel that judge and counsel are brethren engaged in the administration of justice. I should perhaps slightly qualify my statement that all advocates are officers of the court, because you remember I told you that in theory in England a

* The second of a series of addresses delivered by the Honb'le Mr. Justice Sundara Aiyar, one of his His Majesty's Judges of the High Court of Judicature at Madras to the apprentices of the year 1910-1911, at the request of the High Court.

barrister is not strictly an officer of the court. He is called to the bar, controlled in his conduct and punished by the Inns of Court, but so difficult is it to conceive of any advocate as other than an officer of the court that, as you will probably remember, it is also the theory in England that the functions of the Inns of Court are delegated to them by the High Court, that the rights to call, to punish, and to control, are all powers or duties intrusted by the Court to the Inns of Court. You may also remember that I said that there is an appeal to the High Court of Justice in England from the decisions of the Inns of Court in refusing to call a person or disbarring a person. As may naturally be expected, notwithstanding the theory that it is the Inns of Court to whom a barrister is subordinate, it was held that Superior Courts have power to suspend from practising before them any barrister who was guilty of misconduct. You will find a case in point in 2 Atkyns's Reports 173, the case of Mitchell. There is a doubt expressed in that case as to the proper procedure. What happened in the case was that Mr. Mitchell was directed to be detained in prison. After he had been in prison for five weeks, he applied that he might be released and he wished to be restrained from acting as counsel; that is, he was willing to give up the privilege. The way in which the matter was dealt with by the Court was as follows. "As to Mr. Mitchell's submission to be restrained from acting as barrister," said the Lord Chancellor, "I shall give no other direction but that according to his own submission he shall he restrained from acting as such till further orders, because from any enquiries that I have hitherto had, I am not satisfied what is the proper course to remove him from practising as a barrister. If Mr. Mitchell had continued a solicitor, there had been no dfficulty, for the ready and proper way would have been to have struck him out of the roll of solicitors; and surely it would be very hard when he has advanced himself to a degree of greater rank and honor in the law, that there should not be some precedent for degrading a person who by his malpractices and misbehaviour has rendered himself highly unworthy of the character he has taken upon himself of a barister-at-law. But whether this ought to be done to one by disbarring him, or whether the court by its own power and authority will silence him for the future, I shall not at present determine, but have already

mentioned it to Lord Chief Justice Lee, who will assist me in finding out precedents in such cases." Then he refers to a Statute of Westminster, which I have already referred to in my previous lecture, in the time of Edward I which gives power to the court to deal with attorneys and sergeants. The modern practice, however, has been for the court not to exercise the power of disbarring by itself, but to make a representation to the Inns of Court, wherever the court is of opinion that a misdemeanor or misconduct which ought to entail the punishment of dismissal from the bar has been committed by any member of the bar. However this is a matter pertaining only to England. Courts in other countries where English barristers may be practising have undoubtedly power to deal with them. In the case of a barrister in Antigua—1 Knapp P.C. 267—no doubt was entertained that the courts of Antigua would have a right to deal with him. At the same time English barristers are subject to the authority of the Benchers of their Inn also, wherever they may be practising, and these Benchers may disbar him; and if the Benchers do so there is no doubt that his right to practise would come to an end, and the court before which he is practising would take steps to strike him off the roll of advocates in the court. So far as India is concerned every kind of practitioner is subject to the disciplinary authority of the courts. The Legal Practitioners Act deals with the procedure to be observed with respect to pleaders who are not advocates, vakils or attorneys of a High Court. With respect to these, the matter is governed by the rules of each High Court. Now, bearing in mind this fundamental fact that every kind of practitioner is an officer of the court, we have to consider the duties that he owes to the court.

The duty of an advocate is, as already stated, to put one side of a case before the court, and in this sense he is the mouthpiece of his client. But it would be a grievous mistake if any advocate thought that he could take shelter under the fact that he is the mouth-piece of his client to justify everything he did or said. He cannot tell the court 'it is my client that says it and I have no responsibility in making it'—a statement of that sort would be absolutely useless. He cannot make foolish and ignorant statements that a client may make. He cannot make

dishonest statements and put the dishonesty to his client's account. Though the representative of his client, he has to remember that he is a representative belonging to an honorable profession, bound by duties to the court, bound by duties to the public, bound by the traditions of an honorable profession, and bound not to dwarf his own nature by his conduct as a member of the bar. But while all this is perfectly true as a general statement of the advocate's duties we shall meet with a great deal of difficulty in the application of it and deciding what exactly an advocate may do in any given circumstance, and I may at once repeat what I said before, that whatever rules may be framed, whatever traditions may be borne in mind, this will not after all make it unnecessary for every person to solve practical questions in the light of his own conscience, to educate that conscience and to keep sharp and constant watch on himself. A great deal will have to be left to the judgment of the particular individual, but some general observations from experience, partly my own and partly that of others, may be of some use to you.

We may start with this undoubted rule that an advocate is bound to put before the court all the facts on record which have a clear bearing on the issues in a case. He is not entitled to suppress any such facts. He is also absolutely bound to state every fact correctly, this is in fact a paramount duty ; he should be guilty of absolutely no inaccuracy, not to speak of misrepresentation. I assure you inaccuracies in the statement of facts will discredit an advocate very soon in the eyes of a judge. The judge will learn to place no reliance upon him. If, on the other hand, he can get credit with the judge for being always truthful and accurate in the statement of facts, it will stand him indeed in very good stead. But suppose he is concerned with an original suit and he knows a number of facts having a bearing upon the particular litigation, is he bound to prove all these facts ? Is he bound to let into the record of the suit all the facts he is aware of? To this I believe the answer is fairly easy, that in original litigation one is not bound to bring on record all the facts that may have a bearing. There, it must be left to each side to introduce before the court the facts which have a bearing upon his side of the case. Of course no untrue facts may be placed before the court at all, nothing that the advocate knows to be

untrue, but an advocate must have liberty to choose the facts which he will place before the court. He should not select them so as to "suggest falsehoods" (to adopt the statement of a learned lawyer). It is impossible that there should be no *suppressio veri*, a statement perhaps which is apt to be regarded as an admission of what is undesirable, but it only means that each side places those facts which it considers material for deciding the particular litigation. No doubt it may sometimes happen that one side has no counsel; it may happen that the counsel on one side is not quite equal to the work that he has to do in the particular case. But it would be a hardship, besides being impracticable, if a rule were laid down that the counsel must place before the court all facts which might have a bearing on the case of his opponent. One thing of course is clear, that it is not the duty of one litigant to *seek out* facts for the other side. It is not his duty to make an investigation on behalf of the opposite side and find out facts which may help him, and generally I think it would not be the duty of an advocate even to place before the court all facts of which he is aware. Now suppose we had a rule the other way; what would be the good of it in practice? An advocate may say: "I do not think these facts have a real bearing; the other side may think they have, I do not think so; why should I place them before the court?" Or again, he may ask the question: "Is it my duty to place facts which according to my opinion ought not to influence the judgment but to which I am afraid this particular judge may attach excessive importance? Am I bound to place my client in a position of disadvantage by introducing things which, I think, ought not to weigh with the court but on account of the idiosyncracies of this particular judge or because of his mode of thinking might weigh wrongly?" The answer must be in the negative, but at the same time it must be remembered that facts ignored by an advocate when brought out by his opponent with skill and placed in a setting of his own may produce on the judge an impression far stronger than they probably deserve. It is generally the best policy not to disregard the opponent's facts, on record, and it is one of the best efforts of advocacy to get the judge to minimise their weight and importance. So far as an original trial is concerned it may

safely be affirmed that one is not bound to bring into the record all the facts that have a bearing on the case. But there are some duties which are often neglected but which ought to be honestly and thoroughly performed. If a client is called upon to produce documents in his possession, they ought to be produced, and every advocate ought to advise his client that, whatever may be the result, he has no right to suppress documents in his possession if called for by the other side. I am afraid that there is sometimes much laxity in the observance of this rule. Some pleaders are apt to say to themselves : " Why should I help by producing my documents ? Let him give secondary evidence"—that is absolutely wrong. You know of course that every person is bound to produce all the documents in his possession except that strangers to the litigation are not bound to produce their title-deeds. When an affidavit of documents is made under the provisions of the code that affidavit ought always to be a perfectly true one. There are some penalties attached to non-production, in the shape of the person having the document being disentitled to put the document in afterwards, but it should not be imagined that one's duty is only to mention them in the affidavit at the risk of not being able to produce the documents afterwards, if he does not do so. There is a higher duty—in the interests of justice and fair-play,—an affidavit ought always to be a true one and there should be absolutely no help given by an honorable advocate to suppress evidence. I need hardly say that no advocate should be guilty of instigation or encouragement to produce false evidence. In discussing a case with the client or his agent or adviser, care should be taken that no hint is dropped which will serve as such instigation or encouragement. Of course it is impossible not to discuss the legal bearings of a case and to consider what is the evidence that would be required to prove the case. Such statements may lead to the production of false evidence—this is a thing which an advocate cannot help. I can only advise you to be as careful as possible to see that you make no attempt to put the matter in such a way as to instigate the production of false evidence or the suppression of documents.

In addressing arguments to a court what is the duty of the advocate? There I think the difficulty is much less than in

leading evidence. There can be no doubt that nothing which is on record should be suppressed and everything material, as I have already stated, should be honestly put before the court; but here again a good deal must be still left to each individual conscience. It can hardly be pretended that everything that has been introduced into the record, including sometimes a great deal of irrelevant matter and much of a trivial nature should be put before the court, but it would be not merely right but also good policy, as I have already said, to put before the court everything that could be material from the point of view of the opponent. The opponent is likely to make capital out of any omission and suggest that the omission was intentional, because in the opinion of the advocate himself it would have a damaging effect on the case of his client. What then is the scope of the advocate's art in the submission of the facts? His first duty is to completely master the facts and the law, and present them in as attractive a garb as possible. He should use all possible efforts to arrest the attention of the court and to state the facts in an interesting way and avoid all dull and prosy talk. If he does that, you may be certain he is not likely to get the judge's attention, who will prefer to look into the papers himself. It is not wise to read very much out of documents; it would be very desirable that the reading should be confined to the most material portions; it will be much better that with regard to the remainder you should state it in your own language; otherwise you will not be able to hold the attention of the court.

Perhaps you may imagine, if an advocate is bound to put everything before the court—all the facts—then, how is he at all to succeed in producing an impression in favour of his own client? You may ask: "If *both* sides are to put all the facts, why require two counsel?" But in reality there is a great deal of scope for the advocate's art, notwithstanding his duty to state all material facts. Let me give one illustration. Suppose you have a picture. The appearance it presents will differ according to the places from which you look at it and according to the light in which you see it. I may say, the advocate's skill, if he has any, will consist in putting the judge at a particular place and making him see it from that place, in distributing the light and shade in the manner that will suit best his client. It may look

monstrous veiwed from one angle; it may look handsome and even beautiful looked at from another. When both sides have exercised their skill in the presentation of the picture it will be the judge's duty to see the picture from all points, to shift his own position, to go round and to see and examine every part. It would not be illegitimate on the part of an advocate to adjust the proportion of particular facts to the exigencies of his client's case by placing some facts first, and others last. A good advocate can impress the judge sometimes in a way that he cannot get beyond him; he can be induced to place everything coming from the opposite side in the setting already imposed on him, and the result is that facts which might really be important appear to him to be comparatively trivial when they are afterwards stated by the opposite side. If you see two skilful advocates arranged as opponents you would then be able to witness a picture presented by one advocate; then when the turn of his opponent comes, the whole thing being reversed, the same facts being stated by them—in a different order, placed in a different setting. Every good judge will feel it his duty not to refuse to examine any case from the advocate's point of view; and no judge need be afraid to do so because after he has acceded to the request and looked at it from a particular point of view, he of course looks from other points of view, and nothing is more conducive to a thorough grasp as to look at the same thing from different points of view. Every advocate is entitled to the judge's attention so long as he is making a genuine attempt to put the case from a particular point of view. He is entitled to a receptive attitude on the part of the judge for a sufficiently long time. A combatant attitude an the part of a judge, or over-critical mood, would probably make it impossible for him to understand the point of view of the client whose cause is being advocated. One essential qualification for winning cases is to win the judge's confidence by the manner of advocacy adopted, and to induce the judge to think that the advocate is sure to have something to say, and that if he persists in an argument, it must be because he thinks that some particular point of view has not been grasped by the court. For this purpose all needless repetition should be avoided; at any rate there should be no repetition of a thing in the same form. It may be that an advocate thinks that what is stated has not sufficiently impressed the judge, but there will be very little

use in repeating the same words. If he can manage to put the same thing in a different form so that it may appear new to the judge—it is possible that what first escaped the judge's attention may impress him afterwards. But the attempt should be to state what perhaps is substantially the same in a way that looks different; an advocate is doomed to failure who can only repeat the same thing in the same language—that is indeed the best way to obtain the reputation of a bore. At the same time there is one mistake committed by beginners—sometimes also by people who are not beginners—namely, that they do not dwell sufficiently on an important fact or on an important aspect of the case. That aspect being familiar to the speaker, he thinks that it has only to be mentioned in order to obtain recognition, but the fact often is that the judge's mind is possessed by some particular aspect of the case. It is therefore important that where it is necessary, the advocate should dwell on a particular matter, but the right way to dwell on it is not to repeat in the same form, as I have already observed. While it is desirable to avoid repetition, it is equally necessary to allow the judge sufficient time to take in completely the particular fact or aspect which the advocate wants to emphasise—success in doing so depends on the skill of the particular advocate. He should be able to lay out his own aspect of facts without putting it on too thick, but if possible by spreading it out by stating slightly different points of view in different sentences. He should try to affect the proportions of the facts. It would be a tactical blunder, as already observed, not to refer to the facts that tell in favour of the opponent. They should be placed in juxtaposition with the facts in his own favour in such a manner that the facts in favour of the opposite side seem to be proportionally not of any importance.

Another important qualification that is required in advocacy is to possess what a learned judge of this court was in the habit of styling "legal imagination." It is not every fact that could be proved by direct evidence in the case. A transaction may extend through many years; it would often be difficult to get actual evidence as to what happened some years before the litigation; even where the facts are not old it might not be possible

to find evidence for every link; there would be a great deal of scope for the imagination. But it should not be forgotten that imgination is not mere fancy, not stating whatever one thinks desirable in the interests of his own client, but so to fill in gaps that it will strike the judge that those facts must have happened notwithstanding that there is no actual evidence to prove them. Of course, it would not be permissible for an advocate to supply by means of hypotheses from imagination recent facts which could be proved by evidence; the court will not permit it. But with regard to facts which took place a long time back and facts which ordinarily it would not be right to expect actual evidence of, the advocate who can supply the missing facts out of a well-educated imagination would have a great advantage over one who cannot do so. Perhaps, to put it in another way, I may say the advocate must try to form a picture of the history of the case from the beginning up to the time it comes before the court. If he can present a picture which is distinct, which accords with the probabilities, then he would be able to get the court to accept portions of it which he may really draw from his own imagination. In this connection I may say you should never rest content until you are able to account for the contentions of your opponent, when you want them to be rejected. If a claim is put forward and you repudiate the claim, it is very important if you can be able to explain to the court how the false claim came to be put forward. You cannot expect the court to believe that it was done merely out of inherent viciousness in the nature of the plaintiff. So also if you appear for the plaintiff it will be well if you can explain why the defendant thought it necessary to put forward a false defence, and if you want to say that a particular document is a forgery, it will be a great point if you can say how this particular forgery came to be made. Nothing appears clear unless it is explained; the human mind is not content with a conclusion unless it is able to explain away everything that *prima facie* appears to be against it. Now I think you will have seen what really is the scope that an advocate has for argument in the actual circumstances of any particular case and I think the scope is wide enough to satisfy any honorable man and worthy of the effort of the most skilful.

Sometimes too strict a view has been put forward of the duties of an advocate. In America the bar has been recently

concerned in the elaboration of rules of professional ethics. I believe that there is a tendency really to lay down too strict a code which it would be difficult for any one to enforce on himself in practice. A writer in the *American Law Review* (Volume 40, p. 280) goes to the extent of saying that an advocate should not put forward arguments which he himself considers unsound. This is not only unpractical but also fundamentally wrong. It is not the function of an advocate and he ought not to usurp that function, to decide what is sound or correct. That is the duty of the judge, and no advocate has the right to refuse to put forward an argument or an aspect of a case, because he regards it as unsound. After all, what does an advocate know of a case except what he has been told by his client. What his client has told him may show that his case is not good, but what comes from the opposite side may show that his case is much better than he thought it was, and it will be confusing the functions of advocate and of judge for an advocate to take upon himself the task of deciding what is the correct view in any particular case. Indeed the public would suffer seriouly if that were the view adopted by the profession. In the first place such an attitude of mind would disable an advocate from seeing his client's aspect of the case as clearly as he would, if he understood his task properly, and, in the next place it may be that an aspect which is really one that ought to be put forward would be kept back because the advocate himself did not set a right value upon it.

A somewhat serious question is discussed by another lawyer, whether an advocate may ever tell a lie while engaged in his professional work. It looks a curious question to put, and the answer does not really clear up matters very much. The answer given is this: that when a witness is being examined an advocate may lie. That is to say, he might say 'such and such other witness said so and so, what do you say to that?" It is stated that this is permissible because the object is only to press the witness and to see whether he would be prepared to repudiate it so as to see whether he is really positive with respect to what he himself states. As far as I am aware this is not really considered proper. But another method is sometimes adopted: "If so and so said so and so, would you be prepared to deny that? But my mind is clear that neither the first form nor the second is really proper.

You have no right to confuse a witness, to disconcert him by saying that "if so and so said so and so, would it be right?" After all a witness is to speak from memory and it will be too great a strain upon him to be required to contradict another person when that other person really does not make a statement upon a particular matter, and I myself think that neither in the hypothetical nor in the positive form is it permissible to state to the witness that a particular statement has been made by another when, as a matter of fact, it has not been made. Perhaps this is a matter we shall have to come to in another lecture when we deal with the conduct of cases.

There is one other matter regarding which there has been considerable difference of opinion and which is by no means easy to settle. In arguing questions of law, is a person bound to cite cases which are against him? The proper view appears to me to be that if one does cite cases at all he ought to cite cases which are actual decisions on the point though they may be against him. But here again it will be difficult to lay down a rule which could be at all of a positive character. Surely it cannot be said that one is bound to cite every case which the opponent, if he knew of it, might cite. Suppose the advocate is of opinion that the case might well be cited on the other side but that it really has no bearing; is he bound to cite it simply to show that it has no bearing? Where the advocate considers it ought not to influence the court—there can be no doubt that he is not. One thing also may be said to be clear: that he is not bound to find cases for the opposite side, that it is not his duty to make researches for the opponent. Personally I would state, without hesitation, that if the case exactly covers the point he is bound to cite it, but the statement must be subject to limitations. Suppose you know of an American case against your contention. It may be that there is no duty to cite it; one is not bound to cite decisions from every country in the world which are in favor of the opponent. But if you cite decisions from America in your own favor, if there is another case exactly covering the same ground, it would be your duty to cite that also. So also with regard to English cases; if you do not cite English cases at all, it may not be your duty to cite an English case exactly in point for your opponent, because English decisions are really not binding

on the courts of this country though they are often the most valuable guides judges have here. But cases which are authoritative decisions and to a certain extent binding on the courts here ought to be quoted if the advocate is convinced that they would be relevant. As I say, an advocate who is inclined to make his own conscience easy has only to say to himself: 'I do not think this case has really a bearing; I therefore do not cite it',—that must be left to each man to settle for himself. I would only say that one ought to be conscientious in deciding for himself whether the case really does cover the particular matter before the court though it is in favor of the opponent.

On this question I think I might cite to you what really perhaps embodies all the judicial pronouncements on the question, the observations made by *Rose* J., an American Judge, in 20, *Canadian Law Times*, p. 62:

"The question dealt with under this head as to whether it is the duty of counsel to point out to the court matters of fact or law which seem to be against his contention, is of surpassing interest.

"In a recent case counsel for the plaintiff is reported as saying at the opening of his argument: 'As the defendant does not appear in opposition to the motion, the plaintiff is bound to call the attention of the court to certain cases which seem to raise a doubt whether the present action will lie' (*Cole* v. *Langford*, 1898, 2 Q. B. 36)—(it was the statement of counsel himself.)—

"Mr. Showell Rogers holds it to be the advocate's duty to point out to the court precedents against himself and wholly undistinguishable which have been overlooked by his opponents. He admits, however, that this is 'a counsel of perfection' the practical exercise of which while certain to win the advocate, who is thus frank and candid, the approbation and favour of the court and the grateful surprise of his opponents is almost equally certain to lose him his client.

"A writer in the *Law Notes* for July 1899 says that if this course is adopted it is hard to see where a line is to be drawn. If precedents decisive in favour of an opponent are to be quoted why not cases making for his view but not decisive? And he quotes a criminal case in which the convicted appellant was

represented by counsel, but the respondent was not, where the Judge said 'I agree that it is unfortunate to a certain extent—although, of course, we do not suggest that counsel for the appellant would not have brought any authorities before us that he knew of—that we have not had an argument for the respondent in order to ascertain whether there has been any authority on this subject during these 50 years.'

"But the most instructive case on this branch of the subject is *Earl Beauchamp* v. *The Overseers of Madresfield*—that is a case in L. R. 8 C. P. 245—in which Lord Beauchamp and the Marquis of Salisbury appealed from decisions of revising barristers. The names of the appellants appeared in the list of persons claiming to vote in respect of freehold houses and lands, but as it was proved that they were peers of Parliament the revising barrister determined that they were not entitled in law to have their names inserted in the register of voters for elections to the House of Commons. The counsel for Lord Beauchamp in opening the case said that it was difficult to contend that such a right as his client asserted existed when every principle of the constitution and all the authorities upon the subject were opposed to it, and the most diligent search had failed to discover a single atom of authority in its favour. And he then went on at considerable length to lay before the court all the authorities he could find on the subject—all against his own contention.

"*Bovill* C. J. said: 'From the course which the learned counsel have taken, and properly taken, on the argument of these cases, it seems hardly necessary for us to do more than pronounce a formal judgment for the respondents, the learned counsel for both of the appellants agreeing that their claim to vote is untenable. As, however, the matter has been brought before us for decision, it may be expedient to state our reasons.'

"*Keating* J. after stating his reasons for agreeing, said: 'I would merely desire to add an expression of my entire approval of the course pursued by the learned counsel for the appellants; and to say that I have yet to learn that it is otherwise than the duty of counsel to say so when he finds a point not to be arguable. I have always understood it to be the chief function of the bar to assist the court in coming to a just conclusion.'

"But *Brett* J.:—'I feel extremely reluctant to give any judgment in this case. The course which has been pursued by the counsel for the appellants has placed the court in great difficulty. I must confess I entertained considerable doubt whether the claim set up could be supported, but I thought it right to make some suggestions for the purpose of ventilating the propositions stated by the learned counsel in admitting that they had no case. I quite agree that it is the duty of counsel to assist the court by referring to authorities which he knows to be against him. But I cannot help thinking that when the counsel has satisfied himself that he has no argument to offer in support of his case, it is his duty at once to say so, and to withdraw altogether. The counsel is master of the argument and of the case in court, and should at once retire if he finds it wholly unsustainable unless indeed he has express instructions to the contrary"—(in this country one always has!) 'With the greatest respect for the two learned counsel who have appeared for the appellants in this case I must confess I do not quite approve of the course which they have taken." With respect to the observations made by one of the learned judges in that case that if counsel is convinced that he has no case, he ought not to argue, it is well that I should say a word of warning. No doubt if the case is completely covered by a number of precedents and the advocate can think of no reasoning by means of which he can attack them, what has been said would hold good. But if it is not a matter of there being no chance for his client on account of previous decisions, but the question has to be decided on principle, a counsel ought not, I have no hesitation in saying' to attach too much importance to his own view on the subject. The decision of the question is not in his hands, and what may appear as cogent to him may not at all appear as clear to the judge, and it is his duty on behalf of his client to advance such arguments as may occur to him in his own client's favour. Now what is said about citing precedents against one's client I need hardly say would not apply to arguments. Arguments are not authoritative in a court; it is because precedents are binding on the court that fairness to the court requires that what is against one's own client should be placed before it; one's *arguments* are his own, and he is not bound to place them before the court. If would be different

if you were dealing with a statute; you would then not be right to quote only some sections or some provisions of the statute and to omit other provisions which in your own opinion distinctly have an important bearing on the point. Here again, as I have already said, there is much scope for the play of individual conscience. The man who can easily say to himself: 'I do not think this section ought to weigh with the court; it is not my duty to place before the court what, in my opinion, ought not to influence its judgment'—will no doubt find it easy to shirk the performance of his duty.

We have been dealing till now with the mode in which matters relevant to a case should be brought before the judge. I need hardly tell you that it is the duty of members of the bar to treat the Bench always with courtesy and deference. It is possible that a judge may sometimes exhibit impatience or he may appear to be rough—the best way to overcome it is not by exhibiting similar impatience or roughness, but to a certain extent by bearing with the judge. Consideration for the Bench should never be withheld; it is sure to have the advantage of making the Bench itself more considerate. An advocate should have faith in the absolute impartiality of the Bench. There should be no tendency to suppose that because the Bench—it may be very wrongly sometimes—is unable to see eye to eye with an advocate who is convinced that his view is correct, the Bench is biassed or prejudiced. We all know very well that what appears very clear to one may appear very differently to another person and what appears clear to one at one time appears far from so at another time. One may often be possessed by some one idea; it may happen that the judge's mind assumes a certain attitude sometimes which the judge himself is unable to shake off; but it is absolutely necessary that the bar should have faith in the absolute impartiality of the judge, however much he may be mistaken. "Exalt and loyally magnify the prestige and power of the court, that thus the administration of the law may be made efficient for the administration of justice." I may read a few lines from the statement of another lawyer which you will find in 28, *Canadian Law Times*, p. 369. "The respect enjoined by law for courts and judicial officers is exacted for the sake of the office, and not for the individual who administers it. Bad opinion of the incumbent, however well founded, cannot excuse the withholding of the respect due to the office, while administering its functions.

"The proprieties of the judicial station in a great measure disable the judge from defending himself against strictures upon his official conduct. For this reason, and because such criticisms tend to impair public confidence in the administration of justice, attorneys should, as a rule, refrain from public criticism of judicial conduct, especially in reference to causes in which they have been counsel, otherwise than in courts of review, or when the conduct of a judge is necessarily involved in determining his removal from or continuance in office.

"Marked attention and unusual hospitality to a judge, when the relations of the parties are such they would not otherwise be extended, subject both judge and attorneys to misconstructions and should sedulously be avoided. A self-respecting independence in the discharge of the attorney's duties, which at the same time does not withhold the respect and courtesy due to the judge's station, is the only just foundation for cordial personal and official relations between Bench and Bar. All attempts by means beyond these to gain special personal consideration and favour of a judge are disreputable.

"Courts and Judicial Officers, in the rightful exercise of their functions, should always receive the support and countenance of attorneys against unjust criticism and popular clamour; and it is an attorney's duty to give them his moral support in all proper ways, and particularly by setting a good example in his own person of obedience to law."

TRANSLATION

OF

APARARKA'S COMMENTARY ON YAGNAVALKYA.

(*Continued.*)

Sloka 137 — Inheritance to Hermit's Wealth &c.

"The heirs to the wealth of a hermit, of an ascetic (anchorite), and a (permanent) bachelor are, in order[1] the preceptor, the virtuous disciple and the brother in religious duties being pupil of the same preceptor."[2] 137.

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1. In inverse order.
2. Colebrook, Vol. II, p. 577. Cf. Mitakshara, S. 458, which is the same.

Sloka 137.

Inheritance to Hermit's wealth &c.

If among hermits, one dies, the preceptor and the like take the wealth in order. The meaning is that in default of the previous one, the succeeding one takes. A disciple with good qualities is the virtuous disciple. The brother in *dharma* is one who has the same preceptor. The fellow-student is one who has the same religion or one who was living with him in the same holy place like Benares. By the text "in the month of Aswayuja [1] what has been acquired and produced previously shall be abandoned" (it is clear) that a hermit has property. The ascetic and the Brahmachari have something (in the shape of) rags, etc.[2]

It has been already laid down that the wealth of a (deceased) sonless man goes to (his) brothers on failure of his wife, daughters, mother and father. The author now speaks of a peculiarity:

Slokas 138, 139.

Inheritance to Re-united brother's wealth.

"A re-united brother shall keep the wealth of his re-united deceased brother; uterine brother of a uterine brother; and shall give it away to one (a Son subsequently) born." 138.

"A brother by a different mother, if re-united, shall take the wealth; and not a brother by a different mother who is disunited. A uterine brother, even though not re-united, shall take it and not (a disunited) brother[3] by a different mother (only)." 139.

Reunion is the confusion of a separated wealth with another separated wealth. He who has it is the person re-united. The wealth of a deceased re-united person, only the re-united brother shall take. Here the brother is the uterine brother and not the brother by a different mother though re-united. The re-united person living shall give the deceased re-united person's share to his son born after his death. This is mentioned by the way. In this matter **Brihaspati**:

"He who (having been divided) is again living, through affection, together with his father or brother or with his uncle even, is said to be re-united with them."[4]

By this (sloka) it is enumerated that there are three kinds of re-united persons. The author (Brihaspati) says in order to know whether what is mentioned, *i.e.*, the re-united brother takes the wealth of the deceased re united sonless brother, applies in case where the wife, etc., of the deceased are living or in their absence:

1. About October. 2. Cf. Mitakshara.
3. Colebrook, Vol. II, p. 554, § 429.
4. S. B. E., Vol. 33, p. 381, Brihaspati. Ch. 25, v. 72.

Slokas 138, 139

Inheritance to Re-united brother's wealth.

" When any one (brother) should die or anyhow renounce worldly interests, his share is not lost; it is allotted to his uterine brother."

" If there be a sister, she is entitled to a share of his property. This is the law regarding (the wealth of) one destitute of issue, and who has no wife or father."[1]

Therefore, even in the case of a re-united person, if there be wife and daughter, the order of succession will be only that mentioned in " wife, daughter."[2]

Where the wealth happens to go to the brothers, it is ordained that he who has the qualification of (being) a uterine re-united brother shall take the brother's wealth.[3]

It should be understood that the sisters inherit only on failure of uterine brothers. Otherwise, the conflict arises to the Sruti: " Women are without energy and do not inherit." It has been said that the reunited uterine brother takes the share of the deceased re-united brother. The very same meaning in order to make it clear by way of contrast, the author says: " But re-united brother by a different mother shall not take the half-brother's wealth." The meaning is patent. In regard to cases where the brother by a different mother is re-united and the uterine brother is not re-united, the author says: " The uterine brother even though not re-united shall take and not the brother by a different mother." Where the uterine brother is not re-united, even then, he alone shall take and not the brother by a different mother even if reunited. The qualification "even if reunited" is implied by the word "even" in the phrase " even if not re-united." By that the (following) meaning is arrived at: Where the whole blood and re-union both co-exist, then he alone shall take the wealth of such a person (re-united uterine brother). But where the reunion is with a brother by a different mother, there the whole blood alone becomes the cause of the inheritance of the share.

Manu :—" If brethren, once divided and living again together as parceners, make a second partition, the shares must in that case be equal; and the first born shall have no right of deduction."[4]

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1. S. B. E., Vol. 33, p. 381. Brihaspati, Ch. 25, § 74, 75.
2. Yajnavalkya, S. 135.
3. Cf. Mitakshara which says that in the presence of a re-united brother a wife shall not inherit.
4. Manu, Ch. IX, § 210.

Slokas 138, 139.

Inheritance to Re-united brother's wealth.

By this, inequality of division on account of the eldest is prohibited and not on any other ground. By that, whatever wealth was mixed together at the time of re-union, in the same proportion he shall take. In this very matter, **Brihaspati** speaks of another peculiarity:

"If among re-united co-parceners any one should acquire property through learning, valour, or other (independent effort of his own), a double share must be given to him; the rest shall take equal shares."[1]

"Should the eldest or youngest of several brothers be deprived (of his share) in partition (अशंप्रदानः) by (*a civil death on his entrance into the fourth order*), or should any one of them die, his *vested interest in a share* shall not wholly be lost.[2]

"But (*if he leave neither son, nor wife, nor daughter, nor father, nor mother,*) his uterine brothers and sisters, and such brothers as were re-united after a separation, shall assemble and divide his share equally.[3]

अंशप्रदान : *Amsapradana*—means partition : तदोहानि : relinquishment of it: by reason of asceticism or degradation, etc., the incompetency (to share). His share is not lost; the meaning is it should be settled. That share, if there are re-united uterine brothers, they alone shall take; and not the non-reunited brothers even if (they are) uterine brothers. On failure of re-united uterine brothers, all uterine brothers shall (समेत्य) assemble together and divide equally and without any perferential treatment. On failure of the uterine brothers, the uterine sisters, it is understood (in the sloka), shall divide. On failure of even those (uterine sisters) the brothers and sisters by a different mother (shall take).

The author now speaks of the person disqualified (from participation) in all partitions.

Sloka 140.

Maintenance of disqualified heirs.

"An impotent person, an outcast and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified) must be maintained, excluding them, however, from participation." 140.

1. S. B. E., Vol. 33, p. 381, Brihaspati, Ch. 25, § 77.

2. This is not in Brihaspati as Apararka says, but in Manu, Ch. IX, § 211.

3. This also is not found in Brihaspati, but in Manu, Ch. IX, § 212.

The impotent, etc., are shareless persons. अंश Amsa means share: shareless persons. They should be deprived of it. They become persons deserving to be maintained. क्लीब Kleeba is one impotent. The outcast will be dealt with (later.) His issue (means) persons born of the outcast. By the mention of the outcast, his son is, of course, included. It is said by Vasishta that:— Sloka 140. Maintenance of disqualified heirs.

However, he should also be separately mentioned. Otherwise by the text: "Their Aurasa, Kshetraja sons" they become competent to share.[1]

The lame—one devoid of legs. A madman: a lunatic; lunacy is a peculiar disease. Idiot—a fool. Blind man: one who has no eyes. A person afflicted with an incurable disease: without remedy. The term "and others" means those who are declared as not qualified for shares in other shastras. In that matter, Narada:—

"One hostile to his father, or expelled from caste, or impotent or guilty of an *upapataka* उपपातक an offence just less than the grossest) shall not even take a share (of the inheritance), if he is a legitmate son; much less if he is a (Kshetraja) son of the wife only." [2]

"One hostile to his father: one who hates his father. *Upapatakam*: a kind of offence. One with it is an *Aupapatika*.[3]

Manu:

"All those brothers, who are addicted to any vice, lose their title to the inheritance.[4]

"Persons suffering from chronic and agonizing desease, idiots, lunatics and lame persons.[5]

"Eunuchs and outcasts, persons born blind or deaf, madmen, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage."[6]

Vasishta:—"But those who have entered a different order receive no share."[7]

The different order is the one other than that of the householder.

Katyayana:—The son of a woman not taken in marriage according to the order of the classes, or of one of the same gotra as her

1. Impotent person's issue.

2. S. B. E., Vol. 33, p. 194. Narada, Ch. 13, § 21.

3. Killing of a cow, etc.

4. Manu, Ch. IX, § 214.

5. Though Apararka ascribes the latter half also to Manu, there is no such sloka in Manu.

6. Manu, Ch. IX, § 201.

7. S. B. E., Vol. XIV, p. 89, Vasishta, Ch. XVII, § 52.

Sloka 140.

husband's, and a man who has assumed the order of a religious anchorite, are never capable of inheritance.[1]

Maintenance of disqualified heirs.

Akramena (not in order) means in breach of the order of the caste of birth. She who is married: her son is the one who is born of a woman married contrary to the order (prescribed by the shastras). Of one who is of the same *gotra* as her husband: one who is born by a husband of the same *gotra* as the wife. The disinheritance of these is on account of the text; and not by reason of want of competency in religious duties: because of there being no ground for their incompetency in religious duties. Even though an outcast has no competency in religious duties, yet the blind and the lame have such competency. For them, there is of course incompetency in the particular religious duties having as their ingredients the sight of ghee, etc., and not ordinarily in all religious duties. There is competency for them in respect of those religious duties which are mentioned in the Grihya Sutras. Are they not married persons? So also Manu:

"If the eunuch and the rest should at any time desire to marry *and if the wife of the eunuch should raise up a son to him by a man legally appointed, that son* and the issue of such as have children, shall be capable of inheriting.[2]

Therefore by the text that eunuchs, etc., have their married state, it is understood that they have the investiture ceremony. It should not be said that the text "if the eunuch, etc., desires"[3] is with reference to the occurrence of disqualifications due to blindness, etc., after marriage. If that be so, the phrase "born blind" would not have been used in the previous text.[4]

Or, let it be that the born-blind and others have no competency in regard to sacrifices by reason of the absence of the investiture ceremony and marriage. But as regards acts of pious liberality there is competency as in the case of Sudras etc. Therefore their disinheritance is not by reason of their want of competency in religious duties, but because of the text. As for what Badhayana says:—

"Granting food, clothes, (and shelter), they shall support those who are capable of transacting business, the blind, idiots, those immersed in vice, the incurably diseased, and so forth, those who

1. Colebrook, Vol. 2, p. 439, § 337.
2. Manu, Ch. IX, § 203.
3. Manu, Ch. IX, § 203.
4. Manu, Ch. IX, § 201.

neglect their duties and occupations, but not the outcast nor his off-spring."[1]

Sloka 140. Maintenance of disqualified heirs.

Those who neglect their duties and occupations: those who have no bread-giving profession like agriculture, etc: but not the outcast and his off-spring. The meaning is, excepting the outcast and his off-spring the others should be maintained. By the disinheritance of eunuch, etc., the disinheritance of their sons is attained. The author speaks of the exception to them.

S. SRINIVASA AIYAR.

(*To be continued*).

NOTES OF INDIAN CASES.

Bandiri Bangaram *v.* Karumoorthy Subbaraju.— I. L. R. 34 M. 159.—We are afraid that the construction placed by the learned judges on S. 43 of the Transfer of Property Act is of questionable soundness, although their decision on the facts may perhaps be correct. According to the learned judges the principle of S. 43 is the acting by the transferee on the erroneous representation of the transferor. If the learned judges intend to lay down that to obtain the benefit of S. 43 it is necessary that the transferee should have acted on the representation so as to have been misled by the conduct of the transferor, they are introducing words into the section which are not there. All that the section requires is that there should be an erroneous representation that the person is authorised, and secondly that the person should profess to transfer the immoveable property for consideration. If therefore, there was a transfer of a certain property which itself implied a representation on the part of the transferor that he was authorised to transfer it and such transfer was for consideration, the transferee would be entitled to the benefit although if he made proper inquiries he might come to know that the transferor had no authority at the time to transfer it. Where there was in fact an express representation that a person was authorised to transfer a certain property and such person professed to transfer the same for consideration, it would be an *a fortiori* case for the transferee to get the benefit of S. 43. The application of S. 43 would not be ousted by the fact that the transferee made no inquiries or was aware that the transferor had no authority provided

1. S. B. E. Vol. 4 V. 230. Baudhayana Ch. 2 p. 37—40.

as a matter of fact there was a transfer professedly for consideration and the transferor made the representation that he was authorised to transfer. Where there was representation on the part of the transferor he could not be heard to say that if the transferee made inquiries he would have known the representation to be false. As the section does not require as in cases of fraud or misrepresentation which would avoid a contract that the person should have acted upon the representation, the transferee's knowledge would not be material. The principle seems to be that the transferee is entitled to act on the basis of the representation actually made. It is apparently this principle that is embodied in S. 18 (*a*) of the Specific Relief Act which applies to cases of persons contracting to sell property having only an imperfect title thereto.

Kondapa Rajam Naidu *v.* Devarakonda Suryanarayana.—I. L. R. 34 M. 173 :—In this case the facts are not clearly given. Apparently however, the defendant who interfered with the plaintiff's enjoyment was not even a trespasser in possession of the servient holding. If the defendant was also a trespasser in possession the principle invoked by the learned judges for upholding the plaintiff's claim in this case would be equally applicable to the defendant who was in possession though as trespasser of the land against which an obligation not yet ripened into a servitude was claimed he would be equally entitled to be protected in his right and therefore would be entitled to prevent persons from acquiring easements in respect of the holding.

Munisawmi Chetti *v.* Maruthammal & another.—I. L. R. 34 M. 211—Apart from the decision upon the question of estoppel considered in a previous isssue of this journal, there is a more important question of Hindu Law considered by two of the learned judges who took part in the decision of the case. Mr. Justice *Wallis* holds, following the *dictum* of Mr. Justice *Bhashyam Aiyangar* in *Sudarsanam* v. *Narasimmulu Maistri*[1] that where two members of a joint Hindu family acquire property by working together without the aid of ancestral property the *prima facie* intention, in the absence of evidence to the contrary, is that they acquire it as joint family property. It does not clearly appear, however, whether in the view of Mr. Justice *Wallis* the sons acquire an interest by birth *ipso facto* in such property. Mr. Justice *Miller*, however, seems to

1. (1901) I.L.R. 25 M. 149.

hold that the sons will take an interest by birth *ipso facto*. The *Chief Justice*, before whom the case came upon reference by the two Judges in consequence of their difference, did not consider that question as there was no reference upon that point. It may be that the ordinary presumption applicable in the case of two co-parceners acquiring property by their joint labour is that they acquire it jointly as joint property and not as common property, but this does not mean that the other members of the joint family who have not contributed in any way to the acquisition have an interest in it. As between the two members of the joint family acquiring the property by their labour it may be joint and joint not in the English sense of the term so as to enable the survivor to take the whole on the death of the one to the exclusion of his issue. The question whether the issue of the acquirers take an interest by birth in such jointly acquired property is a more difficult one and is entitled to greater consideration than has been bestowed upon it in this case. The *dictum* of *Bhashyam Aiyangar* J. in *Sudarsanam Maistrie's*[1] case already referred to is that the sons acquire an interest by birth. That learned Judge proceeds on some general principles of policy and dissents from the view of Mr. Mayne in his book on Hindu Law (paragraph 277) which itself is based upon the decision of the Bombay High Court in *Chatterbhooj* v. *Dharamsi*[2].

If a person by his labour and earnings without detriment to the family estate acquires property, such property is admittedly self-acquired property in which the other members of the family have no interest and his sons will not be entitled to ask for any compulsory partition in respect of such property during his life-time or to question alienations made by him. If that is possible and legal under Hindu Law it cannot make any difference if, instead of one acquiring, two members jointly acquire property so as to be the self-acquired property of the two jointly. If, according to Hindu Law, a single member can hold property exclusively as self-acquired property, two members can hold property jointly as self-acquired property. Where two persons by their own labour make such an acquisition why should it be presumed that they make the acquisition for the whole family and not merely for themselves? The presumption of Hindu Law is no doubt that property is joint family property, and the onus lies upon those asserting it to show that a particular property is the self-acquired property of the member acquiring. Where two persons labour together

1. (1901) I.L.R. 25 M. 149. 2. (1884) I.L.R. 9 B. 438 at p. 445.

and acquire property it will be the self-acquired property of the two under the same circumstances as will constitute it a self-acquisition if one member has made the acquisition and there is no presumption in such a case that the acquirers have acquired the property jointly for the whole family and not merely for themselves. We do not think that by accepting such a view there is any introduction of a species of joint family property unknown to the *Mitakshara* as Mr. Justice *Miller* seems to think. Instead of the property being the self-acquired property of one it is the self-acquired property of two, and such a species of property is known to the *Mitakshara*. According to the *Mitakshara* the son takes an interest by birth even in self-acquired property of the father, and has, by that circumstance, an interest during the father's lifetime though such interest will not entitle him to ask for compulsory partition during his father's lifetime or to question any alienation made by the father. Even assuming that the joint acquisition will entitle one of the joint acquirers to take by survivorship by reason of the son's interest by birth, such a survivorship will not entitle the survivor to take to the exclusion of the male issue. In fact there is nothing in the *Mitakshara* inconsistent with this view. As we have said already we are sorry the question has not been given that consideration which it deserves from the judges in this case.

SUMMARY OF ENGLISH CASES.

Wallis, Son & Wells *v.* Pratt and Haynes.

[1910] A. C. 394.

Sale of goods by sample and description—Delivery not according to description—Re-sale by purchaser—Effect of—Exemption clause—Effect of.

The facts of this case are given fully in XXI *Madras Law Journal*, page 163 [(1910) 2 K.B. 1003 (C.A.)] The English Sale of Goods Act provides as follows:—

(1) Warranty means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. (2) A buyer may elect to treat

a condition as a warranty. (3) A stipulation may be a condition though called a warranty in the contract. (4) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods.

Agreeing with the dissenting opinion of *Fletcher-Moulton* L. J. the House of Lords *held* as follows :—If a man agrees to sell something of a particular description he cannot require the buyer to take something which is of a different description, and a sale of goods by description implies a *condition* that the goods shall correspond to it. But if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it, but he may treat the breach of the condition as if it was a breach of warranty, that is to say, he may have the remedies applicable to a breach of warranty.

A claim to deliver goods which were not in accordance with the contract could not be treated as collateral to the main purposes of such contract. A failure to supply goods according to description is a breach of a *condition* and not of a warranty. As the exemption clause aimed only at relief against breach of warranties and not of conditions, the sellers are liable to compensate the buyers in damages. [Compare Ss. 113 and 117 of the Indian Contract Act.]

John D. Hope & Co. v. Glendinning. [1911] A. C. 419.

Stock Exchange—Broker and client—General lien.

Bankers and brokers have a general lien on securities in their hands as between themselves and their customers for the balance due from those customers on account between them. This rule applies even where such agent contracts for an undisclosed principal and it is not contingent on the principal's making default, for the agent remains primarily liable on the contract to the other contracting party. Documents in connection with a transaction which is closed can be retained in respect of a liability arising out of a *subsequent* transaction. In this respect a

tradesman or a factor is similar to a solicitor. [Compare S. 171 of the Indian Contract Act.]

Wyatt *v.* Attorney-General of Quebec.

[1911] A. C. 489.

Right of fishing—Grant by Crown of lands on both sides of a navigable river—Whether it conveys a right of fishing also.

Right of fishing in a navigable and floatable river rests in the Crown and a grant by the Crown of lands on both sides of such a river cannot be held to include the right of fishing also unless the grant expressly conveys the same.

Thames & Mersey Marine Insurance Co., Ltd. *v.* Gemford Ship Co., Ltd. [1911] A. C. 529.

Insurance (Marine)—Non-disclosure of material facts—What is.

Held: that in a case of marine insurance, non-disclosure of the previous carrier and conduct of the master of the vessel, however bad it might have been, does not avoid the policy and that a non-disclosure of the extent of previous insurances avoids the policy especially if they were of a wagering character and covered an amount very much in excess of the value of the vessel so that it could be said that it would be a great deal better for shareholders of the vessel if the ship were lost.

Nash *v.* Layton. [1911] 2 Ch. 71.

Interrogatory—Extent of right to—Relevant facts and facts in dispute—"Money-lender"—Question of law.

The law as to interrogatories is thus laid down in *Marriott* v. *Chamberlain*[1] : "It is not permissible to ask the names of persons merely as being the witnesses whom the other side is going to call, and their names not forming any substantial part of the material facts; it is not permissible to ask what is mere evidence of the facts in dispute but forms no part of the facts themselves. With these exceptions anything that is material may be asked. The right to interrogate is not confined to the facts directly in issue but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of facts directly in issue."

1. (1886) 17 Q. B. D. 154.

Per *Master of the Rolls* and *Buckley* L. J. :—Whether upon the facts found, a man is a money-lender or not is a question of law and not a mere question of fact; so that facts on which such a conclusion might rest, viz., individual acts of lending within a reasonable time of the particular act of lending in connection with which the question whether the lender is a "money lender" arises, are facts in dispute and not merely evidence of facts in dispute as to which interrogatories may be served. Anyhow, under the latter part of the rule, viz., interrogatories may be served as to facts relevant to the existence of facts in dispute, interrogatories as to such facts are permissible.

Fletcher-Moulton L. J. *contra* :—Whether a man carries on the business of money-lending is an issue of fact, and individual acts of lending to third parties are but pieces of evidence of that fact in dispute, having no direct connection with the actual matters in dispute, and interrogatories therefore cannot be properly served as to them. The court must decline to assist a fishing cross-examination by allowing it to take place by the methods of discovery instead of at the trial.

In re Dee Estates, Ltd. Wright *v.* Dee Estates, Ltd. [1911] 2 Ch. 85.

Solicitor's lien—Company and trustee for debenture-holders—Employment by trustee—Costs incurred before execution of trust-deed.

A company resolved to issue mortgage debentures to be secured by a trust-deed and a trustee was proposed. The proposed trustee employed a solicitor to act on his behalf in that matter. *Held*: The solicitor was entitled to a lien on the trust-deed in respect of all costs properly incurred by him in relation to the trust, whether they were incurred before or after the execution of the deed; whether as against the trustees or as against the debenture-holders and although it may be as between the company and the trustees or debenture-holders, the company was the person primarily liable.

Solomon *v.* Attenborough. [1911] 2 Ch. 159.

Executor—Power to pledge—When it ceases.

It is quite true that for many purposes an executor in certain circumstances is or is deemed to be or to become a trustee, but an executor does not cease to be executor as soon as the debts

pecuniary legacies and funeral and testmentary expenses are paid or discharged, especially if the residue be not ascertained or distributed. So far as concerns personal estate not previously alienated and excluding chattels comprised in a specific bequest to which the executor has assented, an executor may sell, mortgage or pledge any part of it, and if he does so he will be presumed to be acting in the exercise of the duties imposed upon him by the will so that the purchaser, mortgagee or other assignee will be under no liability to creditors or legatees.

In this case, one of the executors, without the knowledge of his co-executor, pawned a plate belonging to the estate and misapplied the money for his own purposes. The pledgee had no notice that the pledgor was not the true owner. At the date of the pledge all the testator's legacies and debts had been paid. *Held*, notwithstanding, that the pledge was good.

Rose v. Spicer : Rose v. Hyman.

[1911] 2 K. B. 234 (C. A.)

Landlord & tenant—Covenant to repair—Breach—Forfeiture—Relief against—Principles.

A piece of ground on which a chapel was being erected was demised for a long term and the lease contained covenants by the lessees to complete the chapel and from time to time during the term to repair, maintain and keep the chapel and other appurtenances in good substantial repair. The chapel was for a long time used as a place of religious worship. The lease was subsequently assigned and the chapel was adapted for a theatre. For this purpose several alterations were made in the building. The alienors had neglected to comply with a notice to repair: *Held* that the alterations were breaches of the covenant to repair and acts of waste which could be restrained by injunction and that the alienees were not entitled to relief against forfeiture except on the terms of restoration of the premises to its former condition.

Principles on which relief against forfeiture should be granted:—"In the first place, the applicant must so far as possible remedy the breaches alleged in the notices and pay reasonable compensation for the breaches which cannot be remedied. In the second place, if the breach is of a negative covenant such as, not to carry on a particular business on the demised premises, the applicant must undertake to observe the covenant in future or at least must

not avow his intention to repeat the breach complained of. In the third place, if the breach complained of, though not a breach of a negative covenant, is of such a nature that the court would have restrained it during the currency of the lease on the ground of waste, the applicant must undertake to make good the waste if it be possible to do so. In the fourth place, if the act complained of does not fall under either the second or the third head, but is one in respect of which damages other than nominal might be recovered in an action on the covenant, the applicant must undertake not to repeat the wrongful act or to be guilty of a continuing breach."

Rans v. Platt.

[1911] 2 K. B. 291 (C.A.)

Bailment—Warehouseman—Negligence—Claim by third party—Duty of bailee—Notice to bailor.

Certain goods belonging to plaintiff, a married woman, living apart from her husband, were deposited by her with the defendant, a warehouseman. Plaintiff's husband, who had no right to the goods, went to the defendant's warehouse and demanded delivery of the goods, asserting that they were his. The defendant refused to deliver the goods to him unless he was protected by a Magistrate's order. Thereupon plaintiff's husband took out summons against the defendant to shew cause why the goods should not be handed over to him. Defendant failed to communicate this claim to the plaintiff though he could have done so in the interval. At the hearing the husband swearing that the goods belonged to him, the Magistrate ordered delivery and the goods were accordingly delivered to plaintiff's husband. Subsequently plaintiff brought an action in the County Court for damages against defendant for recovery of the goods and damages. The Judge directed that the defendant would be responsible if he were negligent in allowing the Magistrate's order to be passed without notice to plaintiff. The Jury found negligence. *Held* (reversing the decision of the Divisional Court) that the bailee failed to take reasonable steps to protect the title of the person who had deposited the goods and that the bailee could not rely on the magistrate's order as protecting him unless he really acted under compulsion of the order.

West Yorkshire Darrack Agency, Ltd. *vs.* Coleridge.

[1911] 2 K. B. 326.

Contract—Consideration—Creditors agreeing mutually to forego claims—Liquidator party to agreement—Claim by debtor—Counter-claim by creditor—Right of debtor to set up agreement.

An agreement between creditors mutually to forego the debts owing to them is binding upon them in the sense that it can be enforced against them by the debtor who has done nothing more than being a party to the agreement. There was an agreement between all the directors of the plaintiff company, of whom defendant was one, that they should forego payment of the fees owing to them by the company and the liquidator was a party to the agreement. *Held*, in a suit by the plaintiff company, the defendant could not counter-claim as the agreement was a bar to such claims.

Hirachand Punamchand *v.* Temple.

[1911] 2 K. B. 330. (C. A.)

Accord and satisfaction—Third party offering sum in satisfaction of claim—Acceptance by creditor, effect of—Extinction of debt.

Acceptance by the creditor of a sum offered by a third party in settlement of the claim against the debtor is a bar to an action by the creditor for the balance of money.

Governor & Guardians of the Foundling Hospital *v.* Crane. [1911] 2 K. B. 367 (C. A.)

Deed—Delivery of instrument as escrow—Assignment of lease—Deliv ry to take effect on death of assignor—Effect of.

The suit was for recovery of possession of a house as upon a forfeiture for non-payment of rent and for a half year's rent. The defendants pleaded that their testator, one *H*, had made an assignment of the lease to one Mrs. *B* before the rent claimed became due. *H*, who was the assignee of the lease, signed and sealed a document purporting to be the assignment of the lease by him to one *B*. The document, which was undated, was delivered to the solicitor of *H* on the terms of a letter addressed to him as follows: "We acknowledge that you have to-day executed an assignment of your lease to Mrs *B* as an escrow and that we are to retain it on your behalf until you send instructions to complete the deed. In case you die before the deed is completed we understand

that we are to consider it as having been completed before your death and to take what steps are necessary to vest the lease in *B* should she wish it * * * " *B* also attested the deed acquiescing in the arrangement. The document was not properly attested to satisfy the requirements of the Wills Act. Subsequently *H* was a party to a deed wherein there was a recital that the term vested in him and which gave him permission to make alterations. *H* died without leaving any instructions. *B* survived him.

Held :—(1) The proper inference from the facts was that the document was never legally delivered by *H* either as a deed or as an escrow and therefore the document was inoperative. (2) A deed of grant of the grantor's own property to take effect only on the death of the grantor is necessarily testatmentary and cannot be turned into a deed.

Donkins v. Pearson. [1911] 2 K. B. 412.

County Court—Removal of action to High Court—Practice—Discretion of Judge—County Courts Act, S. 126.

S. 126 of the County Courts Act enacts that it shall be lawful for the High Court or a Judge thereof to order the removal into the High Court by writ of *certiorari* or otherwise of any action commenced in the County Court if the High Court or Judge shall deem it desirable that the action shall be tried in the High Court upon terms as to costs.

The test to be applied in determining whether it is desirable that the action should be tried in the High Court is whether it is more fit to be tried in the High Court than in the County Court. The party who applies for such removal should establish the point.

Defendant being the Secretary of a Trade Union was sued on behalf of the Society by plaintiff. The defence to the action depended on the determination of a difficult question of law. The defendant applied to remove the cause to the High Court, and the Judge ordered the removal, making proper provision for the protection of the plaintiff. *Held* that the order was right.

Whiteson & Pitt v. Stennings. [1911] 2 K. B. 418.

County Court—Judgment debt—Payable on future date—Garnishee summons before day fixed—Jurisdiction.

If a judgment orders the payment of a sum of money on a certain date garnishee proceedings cannot be commenced before the time given by the judgment for the payment of money has expired.

JOTTINGS AND CUTTINGS.

Honour to Thackeray.—The centenary banquet at the Middle Temple in honour of Thackeray was a little premature, as the novelist was not even born till July 18, 1811 (says the *Pall Mall Gazette*) and did not enter that society till 1831 What is worse is that no report of the speeches by Sir Robert Finlay, Mr. Birrell, and Mr. Justice Darling, which must have been good reading, were permitted—why not, does not, appear. It was stated that one of the senior benchers present, Mr. John Digby, who was called in 1852, had dined in Hall with both Dickens and Thackeray, Mr. Birrell characteristically turned the point to account by remarking that if Dr. Johnson had been a member of the Bar, Mr. Digby would have dined with him, too. Perhaps it is not generally known that Charles Dickens was admitted a student of the Middle Temple on December 6, 1839. It is said that, like Thackeray, he hoped to become a Stipendiary Magistrate.—*The Law Journal.*

* * *

An Imperial Court of Appeal—At the Imperial Conference on Monday the question of creating one final Court of Appeal for the whole empire was discussed. Mr. Asquith presided, and the Lord Chancellor and Mr. Haldane were present, in addition to the Colonial Premiers.

The following is the official report of the proceedings :—

Notice had been given of the following resolutions :—By the Government of the Commonwealth of Australia :—'That it is desirable that the judicial functions in regard to the Dominions now exercised by the Judicial Committee of the Privy Council should be vested in an Imperial Appeal Court, which should also be the final Court of Appeal for Great Britain and Ireland.' By the Government of New Zealand :—' That it has now become evident, considering the growth of population, the diversity of laws enacted, and the differing public policies affecting legal interpretation in His Majesty's Oversea Dominions, that no Imperial Court of Appeal can be satisfactory which does not include judicial representatives of these Oversea Dominions.'—*The Law Journal.*

THE AUSTRALIAN VIEW.

MR FISHER, in moving the Commonwealth resolution, said that they wished to advance the view that it was advisable to have one Imperial Court to which all cases could be submitted for final decision. The constitution of that court need not be gone into at the moment.

Mr. BATCHELOR pointed out that there were at present two Courts of Final Appeal in the Empire—one the Judicial Committee of the Privy Council for the Crown Colonies, India, and the Oversea Dominions, and the other the House of Lords for the United Kingdom. That was an anomalous position, and unless there were serious practical difficulties in the way it ought not to be continued in the Empire as now developed. When an appeal was made to a court of final jurisdiction there ought to be no possibility of uncertainty or of conflict of opinion in different parts of the Empire as to what the law really was. As the two bodies were composed largely of the same Judges, there seemed to be no great reason against having one court. The judgments of the Privy Council were findings of a Board rather than decisions of a Court. It was the one Court in the Empire which did not give individual judgments.

MR. ASQUITH said that some people thought that that was a drawback, others that it was an advantage. One never knew whether a judgment of the Privy Council was unanimous or not, or to what extent it was dissented from.

MR. BATCHELOR said that it was one of the arguments sometimes used against it. The practice of giving one judgment only could not tend to the same close study of a case by each individual member of the court as the giving of an individual judgment would require. Moreover, the institution of one Final Court would be another step in the direction of Imperial unity.

THE LORD CHANCELLOR'S EXPLANATION.

LORD LOREBURN in explaining the nature of the jurisdiction already existing, said that the House of Lords heard all the appeals from the United Kingdom. In theory every peer was entitled to sit in the House of Lords as a Court of Appeal, but for a long time the attendance had been restricted to the judicial members—namely, the Lord Chancellor, four Lords of Appeal, with any previous Chancellor, and any peer who had held high judicial office; three members formed a quorum, but the Court seldom sat with less than four. The Judicial Committee of the Privy Council had jurisdiction, broadly speaking, in regard to India, the Dominion and Colonial Courts, and

certain other Courts. From this it followed that the cases dealt with might involve old French law, Roman Dutch law, English common law, considerably modified by statutes in different Dominions, and also the Indian Codes. It was therefore necessary to adjust the composition of the tribunal to the nature of the laws with which it had to deal. The Judges entitled to sit on the Judicial Committee were the Lord Chancellor, the four Lords of Appeal, all Privy Councillors who had held high judicial office, two Judges with special knowledge of Indian law, and also Judges not exceeding five in number from the Dominions or Colonies. In practice the members were the same as those who sat in the House of Lords, with the addition of Sir Arthur Wilson, who was unquestionably a judge of the very highest ability, but of whose services they would shortly be deprived. If both the House of Lords and the Judicial Committee were sitting at the same time, a distribution of the available members was made, and the utmost care was taken to equalise as far as possible the strength in the two Courts. In substance the *personnel* of the two Courts was identical, and he had never known a case in which there had been conflict between their decisions

DR. FINDLAY said that that conflict, when any, had been in connection with *dicta* of different members.

LORD LOREBURN said that that constantly occurred in England and between different *dicta* in the House of Lords itself, where it was the custom for each judge to deliver his own judgment. Sometimes the judges differed in opinion, and sometimes they agreed, but for different reasons. His own view was that if in every court there was only one judgment there would be more coherence and consistency. That, however, was a point in regard to which the Home Government would not be disposed to make any difficulty. Each constituent part of the Empire ought to judge for itself as to the kind of tribunal it wished and the composition of that tribunal. Whatever Court of Final Appeal in England was desired by any of the Colonies, the Home Government would wish to give effect to the desire as far as possible, and if they would agree on the same kind of court and the same kind of judges, so much the better. With regard to the Privy Council, was it desired to have British judges only? Was it desired that the Indian judges should take part in the appeals from the Dominions? Was it desired that there should be a permanent judge from each Dominion and that those judges should deal with all the appeals to the Privy Council, or that the individual judges should with the British judges deal only with the appeals from their respective Dominions? If desired, it could be arrange

that all the cases from a particular Dominion should be heard consecutively and a time fixed for their hearing convenient to the Dominion concerned, so that a judge from that Dominion might be present. Having regard to the complex nature of the jurisdiction, the best course would probably be to have always a wide membership of the Judicial Committee and that a selection should be made according to the nature of the case to be tried. That was done at present, so far as there was the necessary judicial strength. Another point for consideration was the different rules which prevailed in different Dominions as to special leave being required, as to the limit of the amount involved, as to the nature of the security to be given, and so forth. With regard to the United Kingdom, the Government were not prepared to recommend that the *personnel* of the judicial body in the House of Lords should be changed. It was already possible to add any distinguished judges from the Dominions. If each Dominion would say what kind of court they preferred and the class of judges they wished to see, the Home Government would do its very best to meet their views. His own idea was that they should add to the highest Court of Appeal both in the United Kingdom and for the Dominions and Colonies by selecting two English judges of the finest quality, that the quorum should be fixed at, say, five, and that the Court should sit successively in the House of Lords for United Kingdom appeals and in the Privy Council for appeals from the Dominions and Colonies. In that way they would have substantially the same court in its full strength for both classes of appeals.

ATTENDANCE OF COLONIAL JUDGES.

SIR JOSEPH WARD pointed out that in order for a New Zealand judge to deal only with New Zealand cases it would be necessary for him to leave New Zealand for six months, and then perhaps have only one case to deal with. He and his colleagues would have no objection to Canadian or South African judges sitting in New Zealand cases, but it would hardly be practicable for New Zealand judges to come over to deal only with New Zealand cases.

LORD HALDANE remarked that in connection with a Maoriland case which occupied nearly ten days before the Privy Council it would have been useful if they could have had a New Zealand judge present, as an assessor, to make sure that no points of importance on a long series of special statutes were missed.

SIR JOSEPH WARD said that the majority of cases from New Zealand would have reference to native lands in regard to which there

was much difference of legal opinion, and it was of the greatest importance that there should be present a Judge who knew the customs of the natives, which had to be considered in such cases.

MR. ASQUITH pointed out that if the Court sat in full strength it would meet the complaint sometimes made with regard to the Judicial Committee being a scratch court and too few in numbers. He had often argued cases in the Judicial Committee before three judges, which he thought was hardly fitting, seeing that there might be appeals from the Supreme Courts of various Dominions.

SIR JOSEPH WARD asked if the Lord Chancellor had any objection to there being only one court by merging the Judicial Committee of the Privy Council with the House of Lords, instead of one for the United Kingdom and another for the Overseas Dominions, and make the one a final Court of Appeal.

LORD LOREBURN said it was practically the same thing, and the system which he had suggested might develop into the one Court. Personally he would be very well pleased if it did. Our own system was somewhat complicated, but he did not think that the legal profession or the people at large at home had any quarrel with the existing final Court of Appeal.

LORD HALDANE said that the Lord Chancellor's proposition was really to make one court, but to keep the old forms.

MR. MALAN said that in South Africa there was no right of appeal from their Appeal Court to any court outside the Union. But every subject had the right to petition the King, and any such petition would, as a matter of practice, go to the Judicial Committee of the Privy Council. If the Committee gave leave to appeal, the case would be considered on its merits. It was not anticipated that there would be more than one such case in five or ten years. Therefore, as far as South Africa was concerned, they were generally satisfied with the present practice. It was, however, felt that the Judicial Committee was in some respects no ordinary court of law at all, and it would be an advantage to have its procedure in conformity with that of the other courts of law. The appeal to the King was one of the connecting links of the Empire, and on purely sentimental grounds it would be a right thing to have one final Court of Appeal for the whole Empire. A great deal sometimes depended on a name, and if they had one Imperial Court of Appeal, perhaps in two divisions, one dealing with appeals from the United Kingdom and the

other with appeals from the Dominions and India, leaving the Lord Chancellor certain discretion in constituting the Bench of the respective divisions, the difficulty might be solved.

MR. BRODEUR said that in Canada they had been very well satisfied with the existing system of appeals before the Privy Council In view of the dispositions of the British North America Act and of the different procedures and practices of the various Provinces, it would be somewhat difficult to make a change. Every one who had practised before the Judicial Committee must have been impressed with the great breadth of mind which prevailed among its members. Not only might a change be objected to by some of the Provinces, but it would be a reflection on the present court, which had given satisfaction.

PERMANENT COLONIAL JUDGESHIPS.

SIR JOSEPH WARD said that there was not the slightest idea of reflecting on the Privy Council or its members. If such a line of argument were followed, no change at all would ever be made. New Zealanders were in the peculiar position that out of their limited area some 7,000,000 acres of land were owned by natives. When litigation in connection with this land arose, native customs had to be taken into account, and it was felt that when important cases of this kind came before the Privy Council it would be a great advantage if they had a representative judge from New Zealand present. In view of the statement of the Lord Chancellor, he would not urge that the Judicial Committee should be merged in the House of Lords. He suggested, however, that in addition to the present members of the Judicial Committee there should be a permanent judge from each of the important Overseas Dominions. The difficulty with regard to a Judge coming over specially was that in all probability he would have to deal with cases which had already come before him in New Zealand. If permanent judges were appointed as he suggested, possibly for five or seven years, after which they would resume their work as Supreme Court Judges, it would not only get over various difficulties which stood in the way of other proposals, but would greatly assist towards securing that uniformity and co-ordination of the law in different parts of the Empire which was so eminently desirable. In view of the importance of the interests involved, the question of expense, so far as each Dominion was concerned, was a secondary matter. New Zealand would hail with supreme satisfaction the presence of judges from the other Dominions in cases in which New Zealand was concerned, and he could hardly think that there would

be any objection on their part on practical grounds to a New Zealand judge taking part in cases from the other Dominions.

DR. FINDLAY said that the creation of one final Court of Appeal for the Empire would satisfy a great Imperial sentiment, and although the *personnel* would differ very little from that of the present Court, it would constitute a step towards closer union. The presence of a resident Colonial judge would obviate the necessity for sending over at great expense counsel from, for instance, New Zealand to see that the Privy Council were instructed on the peculiar features of New Zealand law. In any fair conception of the burdens of Empire there should be no objection to the Dominions sharing the cost of the Imperial Court of Appeal by paying the salary of one of their own judges.

SIR E. MORRIS said that very few appeals came from Newfoundland, and they were generally satisfied with the present arrangements. At the same time, if there was a desire for change on the part of Dominions who were more largely concerned in the work of the Judicial Committee, he would not consider himself justified in voting against the resolution. The proposed change was largely one of name, the Imperial Court of Appeal instead of the Judicial Committee of the Privy Council. There could be no objection to each Dominion having a representative on the permanent Court of Appeal. The principle was in harmony with the general sentiment of unification now prevailing.

MR. ASQUITH asked whether the other Dominions would approve of Sir Joseph Ward's suggestion that each Dominion should appoint a resident judge who should sit not only in cases affecting his own Dominion, but in appeals from all the dominions.

MR. BRODEUR said that in view of the different systems of law prevailing in Canada they would prefer to adhere to the existing system.

MR. FISHER said that in Australia they desired to have an Australian final Court of Appeal: failing that, they desired to have one Court of Appeal in England. He was not at present prepared to accept Sir J. Ward's suggestion.

MR. MALAN said that South Africa would not send a resident judge to serve on the Committee.

SIR E. MORRIS said that Newfoundland would not be prepared to appoint a man and pay his salary and expenses, in view of the small number of cases from that country,

MR. ASQUITH said that he would prefer the suggestion that the cases from a particular Dominion should be fixed to be heard at a time to suit the convenience of a judge from that Dominion. He thought that this would substantially meet Sir J. Ward's view that when cases from a particular Dominion came on it would be an advantage to have a local judge present, and the Government would be glad to meet that view as far as possible.

ONE COURT IN TWO DIVISIONS.

LORD LOREBURN agreed that if there were only one or two cases, the sending over of a judge would be a large order for a comparatively small result. As he understood the discussion, there was general agreement to the following effect :—That there should be for the whole British Empire one Final Court of Appeal in two divisions, one for the United Kingdom, consisting of the same persons who were now entitled to sit in the House of Lords, and the other for the Overseas Dominions, consisting of the persons not entitled to sit on the Judicial Committee, with such further additions as might be agreed upon, and that it should be strengthened by the addition of two English judges.

SIR JOSEPH WARD thought that that represented the only *modus vivendi*.

MR. FISHER said that he would withdraw his resolution and substitute the following :—'That, having heard the views of the Lord Chancellor and Lord Haldane, the Conference recommends that the proposals of the Government of the United Kingdom be embodied in a communication to be sent to the Dominions as early as possible."

MR. BATCHELOR said that they looked forward to one Final Court of Appeal for the Empire. The two divisions seemed to be a practicable arrangement for the time being, but it ought to be understood that the proposal was merely for the time being. The original resolutions were then withdrawn, and the subsituted resolution was unanimously agreed to.

THE LAW OF CONSPIRACY.

MR. FISHER formally moved :—' That the members of this Conference recommend to their respective Governments the desirableness of submitting measures to Parliament for the prevention of acts of conspiracy to defeat or evade the law of any other part of the Empire ; that the Imperial Government make similar representations to the Government of India and the Crown Colonies.'

MR. BATCHELOR pointed out that at present it was often impossible to reach the people really responsible, and he suggested that

the question should be referred to a Committee to see if there was any possibility of securing greater co-operation on the subject throughout the Empire.

After a short conversation, the resolution was withdrawn on the understanding that the Home Government would communicate with the non-self-governing parts of the Empire to ascertain whether it was practicable for them to deal with the matter by legislation.

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Coronation Honours for Lawyers.—In the list of coronation honours are many legal names. The Lord Chancellor has been made an Earl, and Lord Macnaghten and Sir Kenneth Muir Mackenzie, K.C., have been created G.C.B.'s. Sir Charles B. McLaren, K.C., who is one of the new peers, was once a practising member of the Chancery Bar. Sir Rufus Isaacs, K.C.,M.P., Sir William Anson, M.P., Sir Frederick Pollock, and Mr. F. E. Smith, K.C.; M. P., have been appointed members of the Privy Council. The Attorney-General is the recipient of two honours, for he has also been made a K.C.V.O., an honour which has also been bestowed upon Sir J. A. Simon. Sir Charles Mathews has been created a K.C.B., and a similar distinction has been conferred upon Mr. J. P. Mellor, Solicitor to the Treasury Mr. James R. Mellor, the Senior Master of the Supreme Court, and Mr. Ryland Atkins, M. P., who was made a K.C. last year, are among the members of the Bar in the list of new Knights, and Mr. H. J. Johnson, the President of the Law Society, and Mr. Norman Hill, a member of the well-known Liverpool firm, are among the solicitors who have been similarly honoured. Rarely has a list of honours included so many lawyers, and never has the profession had better reason to be gratified by the selections made.—*The Law Journal.*

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The Retirement of Sir Arthur Wilson.—Sir Arthur Willson, whose services as an expert in Indian law have been of the greatest value on the Judicial Committee during the nine years he has been a member of that tribunal, is, we regret to learn, about to retire. His connection with the administration of Indian law has been intimate and long. He was appointed a Judge of the High Court in Calcutta in 1878; he was Vice-Chancellor of the Calcutta University for eight years; and he was Legal Adviser and Solicitor to the India Office from 1898 to 1902, when he was appointed a member of the Judicial Committee under Section 30 of the Act of 1833. Fortunately, the Committee still has in Syed Ameer Ali and Sir John Edge

two members with a special knowledge of Indian law, but, nevertheless, the services of Sir Arthur Wilson—who has not yet completed his seventy-fifth year—will be much missed, especially at a time when the Government have come to recognise that the Judicial Committee must be strengthened.—*The Law Journal.*

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The Art of Cross-Examination.—Some twenty years ago, as the result of Sir Charles Russell's handling of one of the witnesses in the famous *Osborne* case, an outcry was raised in the Press against what was called 'the abuse of cross-examination.' To-day, in consequence of a Divorce Court scene in an emotional play, of which Mr. Hemmerde, K.C., is one of the authors, we have, from persons in whom sentiment takes the place of judgment, a mild revival of the protest. The tortures which the heroine of 'A Butterfly on the Wheel' endures in the witness-box in the Divorce Court are entirely due to her own indiscretions. The audience know that she is innocent, but her husband's counsel, who submits her to a searching cross-examination, has every reason to believe that she is guilty, and is seeking to conceal the truth. If the evidence given against her is not sufficient to point to infidelity, there is scarcely a petition in the Divorce Court that could succeed. The very penalty of indiscretions in matrimonial affairs is that they are clothed with the appearance of guilt. Cross-examination is merely an instrument for ascertaining the truth—an exceedingly unpleasant instrument, it is true, to an indiscreet lady who is conscious of her innocence—and her husband's advocate does not, apart from some unnecessary intimations of his disbelief in her story, employ it in a manner unworthy of an English gentleman. The notion that cross-examination is a wheel on which innocent persons are broken is utterly absurd. 'You seem to think the art of cross-examining is to examine crossly,' Baron Alderson once remarked to an advocate who was cross-examining with more vigour than skill. All the foremost exponents of the cross-examiner's art have recognised that courtesy is more effective than bullying. Of the famous Scarlett it has been written that 'he would take those he had to examine, as it were, by the hand, make them his friends, enter into familiar conversation with them, encourage them to tell him what would best answer his purpose, and thus secure a victory without appearing to commence a conflict.' There is, in truth, an excellent reason why, apart from his regard for his calling, an English advocate should never attempt to browbeat a witness. Every jury-box contains twelve possible witnesses in other causes, and they are

quick, in these days at any rate, to resent any unfair use of the cross-examiner's power. The cross-examiner has, of course, to adapt his methods to the character of the occupant of the witness-box; an assertive witness cannot be approached in quite the same style as a timid one; but the idea, which some persons have derived from 'A Butterfly on the Wheel,' that cross-examination is systematically cruel and ill-directed, can be entertained only by persons who have no real acquaintance with the administration of the law.—*The Law Journal.*

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THE CORONATION AND THE LAW.

By Edward Manson.—A simple thing it seems—the placing of the 'golden round,' as Macbeth calls it, on the head of a Sovereign. Yet how full of historic symbolism the ceremony is, of associations linking us with the earliest ages of our English race. How it illustrates the marvellous continuity of our institutions. 'Le Roi est mort, vive le Roi,' so runs the phrase, and on a King's death heralds and pursuivants go forth to proclaim his successor. Here is the theory of the Norman lawyers—of the Crown as an inheritance; but the Crown was not always hereditary. It was the acclamations of people which among the Franks, Lombards, Burgundians, and our own rude Saxon forefathers settled the succession. It is this verdict of the popular voice which is perpetuated in our Coronation ceremony of to-day and gives it its real significance. When, at the crowning of Henry IV, the Archbishop demanded of the assembly whether he should crown Henry, he was answered by general shouts of 'Yes, yes!' The same shouts acclaimed, as the chronicler tells us, the crowning of Edward IV.

Anointing symbolises the consecration of the King to his high office, and crowning is the investiture of the King by the people with temporal power in affirmance of his title by inheritance; and, what is specially to be noted, it is a ratification made on terms. Archbishop Aldred, at the crowning of William the Conqueror at Westiminster, would not place the crown on the Conqueror's head until he had solemnly promised 'that he would as well govern the nation as any King before him best did.' What the Conqueror so swore was 'to defend the churches of God and their rules, and to rule justly and with Royal providence all the people submitted to him, to establish and maintain rightful law, and to utterly prohibit plunder and unjust judgment.' Our present form of Coronation oath prescribed by I. Will. & M., c. 6. exacts the same, but it has been made

more precise at every point. It is administered by one of the Arch-Bishops or Bishops of the realm in the presence of the people, and runs as follows :—

The Archbishop or Bishop shall say: 'Will you solemnly promise and swear to govern the people of the Kingdom of England and the Dominions thereunto belonging according to the statutes in Parliament agreed on and the laws and customs of the same?'

The King or Queen shall say: 'I solemnly promise so to do.'

Archbishop or Bishop: 'Will you, to your power, cause law and justice in mercy to be executed in all your judgments?'

King or Queen: 'I will.'

Archbishop or Bishop: 'Will you to the utmost of your power maintain the laws of God, the true profession of the Gospel and the Protestant reformed religion established according to law? And will you preserve unto the bishops and clergy of the Realm and to the churches committed to their charge, all such rights and privileges as by law do, or shall, appertain unto them or any of them?'

King or Queen: 'All this I promise to do.'

After this the King or Queen laying his or her hand upon the Holy Gospels shall say: 'The things which I have here before promised I will perform and keep; so help me God.'

Then the King or Queen shall kiss the book.

Rousseau and other philosophers have postulated a social contract as the basis of Government, and later writers have been at great pains to point out that this social contract is a fiction; but in the Coronation oath the social contract becomes a reality.

All was not ended with the ceremony in the Abbey. After it the King was anciently conducted to the great Hall of Westminister, and there placed, royally apparelled, and with his sceptre in his hand, upon a seat, which was thence denominated 'the King's Bench.' This ancient seat, which occupied the upper end of the great hall, was appropriated to the administration of justice by the Sovereign in person, or by the judges of the Court, and it gave to the court the title of the Court of King's Bench. During many reigns the King sat in person administering justice, now at Westminister, now at Winchestor, now at York; but as law became more of a technical science, he withdrew and left the administration to the skilled persons who had sat with him on the Bench as assessors. These are the judicial ancestors of our judges, but still in theory the

King is present in his courts fulfilling his oath to 'cause law and justice, in mercy, to be executed.'—*The Law Journal.*

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The Judges at the Mansion House.—THE LORD MAYOR, in proposing the toast of 'His Majesty's Judges,' said he would be brief in his remarks because probably none were so bored with speeches as the judges, and probably none so little influenced by them. This gathering was a very exceptional one, as every department of the law was here represented by its qualified head. In common with all Englishmen he had a profound belief and absolute confidence in the impartiality and independence of the Bench. They had all admired the spirit which had been shown in recent appointments. Partisanship in politics was no special qualification for the adminstration of the law, and devotion in one branch of public service did not necessarily constitute a guarantee for usefulness in another. The judges were happily independent and above all executive influence, much less control, for it was on them that the liberties of the people depended.

THE LORD CHANCELLOR, in responding to the toast, said that this was the sixth year since he assumed office that the judges had been privileged to enjoy the hospitality of the Lord Mayor. On each occasion they had received encouragement from successive holders of the office. It had long been his opinion that the method and spirit in which justice was administered throughout the British Empire was one of the mainstays of that Empire. In the King's dominions there were many races, many creeds, many peoples; they could not have everything in common, but there was one common bond between them all—they had the full knowledge and assurance that they would have administered to them free and pure justice. That was the sure foundation of all that went to make up the dignity of human nature, and to it could be traced the sense of a common equity which they had now spread over one quarter of the inhabited world. One day or another it would be regarded as not only true, but as a truism, that if they wanted to have justice properly administered they must select men the most suitable for the purpose.

THE LORD CHIEF JUSTICE, on rising to propose 'The Profession of the Law,' said the reason given by the Lord Mayor for calling on him to perform this duty was that he could not ask a lawyer to do it, and perhaps it might have been thought that, as was said of one of his predecessors, 'If he knew a little law, he would know a little of every thing." The judges could not discharge their duties properly

without the assistance of a free and independent Bar; it was quite impossible to do their work satisfactorily unless they had that advantage. If judges woud only listen they would learn a great deal from the skilled advocates who practised before them, and the Bar was as able now as it had ever been to instruct the judge. He hoped that notwithstanding all journalistic rumours, the eminent man who was now leader of the Bar of England, and discharged the duties of the office with so much distinction, would long continue to hold it. He also associated the head of the other branch, the President of the Law Society, with the toast.

THE ATTORNEY-GENERAL (Sir Rufus Isaacs), in responding, said that when he listened to the Lord Chief Justice he was reminded that both Lord Alverstone and Lord Loreburn were predecessors of his in the office which he now filled. He joined issue with what had fallen from the Lord Mayor as to the position of the advocate. No judge had ever been bored by a speech of counsel so much as he had been when listening to an opponent to whom he was waiting to reply. The Lord Mayor had also spoken, none too proudly, of the position which the judges held. The reputation of the judges did not depend on any laudatory phrases, but was based on their achievements, and was grounded on the general appreciation of the way in which they administered the law. The Bench could not be above criticism ; on the contrary, it invited it, as long as it was frank and in the right spirit. If it were ever to present that kind of criticism it would have lost much that gave it its present claims to the confidence of the people. Lord Bowen once said: 'I do not know if I may speak of the judges as human beings,' but he did not fail, for all that, to remind them that they were aware of each other's shortcomings. In the City of London there was always a warm heart for the law. So long as the Bar, as well as the Bench, did their duty with courage and independence, so long would they retain the confidence of the City.—*The Law Journal.*

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Royalty and the Inns.—THE Benchers of Gray's Inn, who presented an address to the King on his return journey from the City on Thursday, referred with fitting pride to the associations of the Throne with their Inn, where 'the glorious, pious, and immortal memory of good Queen Bess' is still solemnly drunk in Hall. To the Middle Temple and to Lincoln's Inn belongs, however, the distinction of having numbered a Sovereign among its members. King Edward, who dined in the Middle Temple Hall in 1903, was the first Sovereign to dine in the Hall of one of the Inns of Court as a

Bencher and not as a guest; and King George, who is a Bencher of Lincoln's Inn, will, it is understood, before long pay a similar visit to his Inn. Lincoln's Inn can number, indeed, two Sovereigns in its list of members. Charles II., who attended a banquet in the Inn in 1671, was, it is recorded, so pleased with his entertainment that he commanded 'the Book of Admittances to be brought to him, and with his owne hand entered his Royaly name therein.' Another Royal visit, though a less festive one, was paid to Lincoln's Inn in 1845, when Queen Victoria opened the new Hall, accompanied by Prince Albert, who, upon being admitted a member of the Society, wore a student's gown over his Field-Marshal's uniform. The old associations of the Royal Family with the Inns of Court are well maintained at the present time. The Duke of Connaught and Prince Arthur are Benchers of Gray's Inn, while Prince Christian is the Senior Bencher of the Inner Temple.—*The Law Journal..*

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Admission to the Profession—One fact recorded in the Law Society's report which will, perhaps, come as a pleasant surprise to those who are accustomed to complain that the profession is overcrowded, is that the number of admissions is smaller than it was ten years ago. While 593 solictors were admitted in 1900, not more than 501—nearly one hundred fewer—were admitted in 1910. During the same period the number of clerks entering into Articles of Clerkship was reduced by 160. The figures as to the Examinations tell a similar tale; the entries for the Preliminary Examination fell from 532 to 357, for the Intermediate Examination from 813 to 607 and for the Final Examination from 882 to 724. What is the explanation of this decrease in the membership of the profession? The improvement in the standard of attainment required at the examinations may account for some part of it, but the extension of officialism, by which the legitimate work of the profession is threatened, may, perhaps, be regarded as the principal cause of it. All the more gratifying it is that the membership of the Law Society should have increased during a period in which the membership of the profession itself has shown signs of declining.—*The Law Journal.*

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The Lord Chancellor and the Earldom.—THE Lord Chancellor, following in the footsteps of his predecessors, Lords Halsbury, Selborne, and Cairns has become an Earl. Lord Halsbury (says the *Daily Telegraph*), was advanced to an earldom in 1898, during his third Chancellorship, and thirteen years after he had first been

appointed to his high office. Lord Selborne's earldom was gazetted on the occasion of the opening of the new Law Courts by Queen Victoria in December, 1882. At the time he was in his second Chancellorship. Lord Cairns, who was originally raised to the peerage in 1867, while he was a Lord Justice of Appeal, was promoted to the higher grade in 1878, when his second Chancellorship was four years old. Lords Herschell, Hatherley, Chelmsford, Cranworth, Westbury, Campbell, St. Leonards, Truro, Lyndhurst, and Brougham never left the ranks of the Barons. Lord Cottenham became an Earl (to the great annoyance of Lord Campbell) on his retirement in 1850, and Lord Eldon's patent of viscounty and earldom was sealed in July, 1821, in anticipation of the Coronation of King George IV. He was then enjoying his second Chancellorship, which endured for the comfortable period of twenty years.—*The Law Journal.*

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Privy Councillorship and practice at the Bar.—NOT so long ago a Privy Councillorship was regarded as incompatible with continued practice at the Bar. Lord James of Hereford was the first to break the old tradition, which, indeed, was an entirely unmeaning one. In 1885, he was sworn of the Privy Council and came back to his briefs. Now the Temple has plenty of Privy Councillors amongst its members. The Attorney-General, Sir Robert Finlay, Sir Edward Carson, Sir Edward Clarke, Mr. Arthur Cohen, and Mr. F. E. Smith are all of that select body. Till quite recently, also, the inheriting of a peerage was supposed to be a disqualification for practice at the Bar. It was thought to be unseemly that one who was technically a judge of the final Court of Appeal should appear as an advocate before it or any inferior tribunal Then Lord Coleridge (in England), and Lord Kinross (in Scotland) declared war upon the old ideas, and established the right of noblemen to earn their living as advocates.—*The Law Journal.*

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Appointment :—Judicial Committee of Privy Council and the new.—The Right Hon. Sir John Edge and the Right Hon. Syed Ameer Ali, *C. I. E.*, have been appointed Members of the Judicial Committee of the Privy Council in pursuance of S. 30 of the Act 3 and 4 William IV., cap. 41, the Right Hon. Sir Arthur Wilson, *K.C.I.E*, having resigned his appointment. Sir John Edge and the Right Hon. Syed Ameer Ali were already members of the Judicial Comittee, and the effect of this re-appointment is to entitle them to be paid £400 a year each. S. 30 of the Act referred to is as follows :

—'And be it enacted. That two members of His Majesty's Privy Council, who shall have held the office of judge in the East Indies or any of His Majesty's dominions beyond the seas, and who, being appointed for that purpose by His Majesty, shall attend the sittings of the Judicial Committee of the Privy Council, shall severally be entitled to receive, over and above any annuity granted to them in respect of having held such office as aforesaid, the sum of 400*l.* for every year during which they shall so attend as aforesaid, as an indemnity for the expense which they may thereby incur; and such sum of 400*l.* shall be chargeable upon and paid out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland.—*The Law Journal.*

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Professional Misconduct.—The considered judgment of the Divisional Court in the case of Mr. Arthur Newton by which he is condemned to suspension from practice for twelve months and payment of all the costs of the proceedings, does no more than follow the rule, which is now well established, that 'misconduct' in a solicitor is not confined to professional offences, but extends to any acts which render him unfit as 'a member of a profession which ought to be free from all suspicion.' Lord Esher, as Master of the Rolls, put the case in his own practical way in *Weare's Case* (1893) when he said the question was whether the offence charged against the solicitor was personally disgraceful, and suggested the following test: 'Ought any respectable solicitor to be called upon to enter into that intimate intercourse with him which is necessary between two solicitors, even though they are acting for opposite parties?' The standard which has been fixed for the legal parctitioner is certainly not lower than that adopted for the medical man; and the rule as to what constitutes 'infamous conduct in professional respect' creating a disqualification to practise as a medical man was stated by the Court of Appeal in *Allinson* v. *General, Medical Council* (1894) in the following comprehensive terms; 'If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency' then he may be held guilty of such infamous conduct. Since Lord Mansfiled's time, however, the limitation of misconduct to such conduct in a professional capacity has been held not to apply to solicitors, by reason of their special relations to the public and to the courts; and the Solicitors Act of 1888, which governs the disciplinary proceedings of Law Society, expressly conferred on them

power to report any solicitor to the court for 'misconduct,' without any qualification. In the case of Mr. Newton, his association with the fabrication of sensational and lying statements for an unscrupulous organ of the Press was held to be 'inconsistent with decent conduct, and the good character of the profession demands that conduct of all its members even outside the work in their chambers or at the courts.—*The Law Journal.*

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The Composition of the Judicial Committee.—It is interesting to note that on the Committee which heard the appeal in the Canadian extradition case was Lord de Villiers, the Chief Justice of the Supreme Court of the Union of South Africa, who was created an English peer last year. He is entitled to sit under the Judicial Committee Amendment Act, which makes the judges of the Supreme Courts of the self-governing Dominions who are Privy Councillors members of the Committee. While the proposal made by New Zealand at the Imperial Conference that there should be one representative of each self-governing Dominion on the Committee was deemed impracticable for the present, the summoning whenever possible, of a distinguished Colonial judge, such as Lord de Villiers, is only a fitting honour, which, when it is more generally applied, will make the court more efficient and more acceptable. Lord de Villiers, being a peer who is a member of the Judicial Committee, has, moreover, the right to take part in the hearing of British appeals in the House of Lords, the office of a member of the Judicial Committee of the Privy Council being, by virtue of the Appellate Jurisdiction Act, 1887, a 'high judicial office' within the meaning of the Act of 1876. It is to be hoped that the Government, whose representatives indicated at the Imperial Conference their intention of making the composition of the two supreme appellate tribunals identical, will proceed without delay to effect this most desirable change. In the meantime it would be both a useful and interesting thing if Lord de Villiers were to exercise his right to sit in the House of Lords as well as on the Judicial Committee, for by thus personifying the connection which already exists between the two tribunals, he would demonstrate the desirability of making it more generally intimate.—*Ibid.*

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The Profession and the County Courts.—Although we welcome the defeat of Lord Halsbury's motion to emasculate the Lord Chancellor's Bill by leaving out its principal provision—for we have always supported the demand for increased facilities in the County

Courts, in the interest of the profession as well as of the public—yet we feel bound to protest against the accusations made by Lord Loreburn to carry his point. It is simply against history to say that 'all the lawyers are, *as usual*, against law reform.' The entire record of the greatest legal legislative achievements, from Lord Brougham's first County Courts Act down to Lord Selborne's Judicature Act, with all its subsequent amendments, proves how baseless is this sweeping assertion. The Bar Council may have been misguided in its opposition to this particular reform, but its views do not always represent the considered judgment even of its own branch of the profession, and the censure of the Lord Chancellor on the opposition to the Bill, that it was an interested professional one, is wholly undeserved. The Bill has still to run the gauntlet of the House of Commons, and its path is not likely to be made easier by general attacks of this character, which lawyers of all sections will feel themselves compelled to resent. Lord Loreburn is, indeed, rather free in his censure of the profession of which he is the titular head. Having attributed the opposition of the Law Society to compulsory land registration to professional interests, he has ascribed the opposition of the Bar Council to extended County Court jurisdiction to the same unworthy motives. This double attack on both branches of the profession may have the merit of impartiality, but it certainly has no other.—*The Law Journal.*

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The Imperial Court of Appeal.—We are glad to see that the Government has lost no time in giving effect to the *vote* of the Imperial Conference that steps should be taken to bring about uniformity between the membership and the procedure of the final Courts of Appeal for Great Britain and for the Empire. It has issued a memorandum giving the details of the reforms made in the constitution of the Judicial Committee of the Privy Council in recent years, and a summary of proposals for further reform. The scheme is that the Government should appoint two further Lords of Appeal, so that there could be six Law Lords devoting their whole time to sittings in the two Courts, which would both be branches of one Imperial Court of Appeal. It would be eminently desirable that one, at least, of the two new Law Lords should be selected from the Colonial Bench, so that the tribunal may regularly be more representative of the Empire than it is to day. It is contemplated that the Court shall usually sit in full strength, either at the House of Lords or at the Judicial Committee. This reform will certainly strengthen the appellate court of the United Kingdom, which has hitherto often been lacking in

strength and authority because of the smallness of the tribunal; and it should help to remove the reluctance of several of the Dominions to allow the decisions of their Supreme Courts to be questioned by the Judicial Committee. Moreover, while it is felt to be inopportune to ask for uniformity in the procedure on appeal from different parts of the Empire because of varying local requirements, the approach to identity of the judges in all cases will tend to efface differences gradually. Another approach to similarity of treatment is contained in the proposal to enable dissenting judges in the Privy Council to give their reasons, and express their dissent, in the same manner as is done in the House of Lords. As the result of the Imperial Conference of 1911, great progress has been made towards standardising the conditions of appeal to His Majesty in Council from all parts of the Empire, and the new scheme of the Government will bring about a closer relation between the procedure at Downing Street and at Westminster. The proposals seem to be good in themselves; and they are good also in that they mark a very definite movement towards the goal of judicature reform in relation to the highest courts —the establishment of one Imperial Appeal Court with one code of procedure for all the subjects of the Crown.—*The Law Journal.*

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The Hardwicke Society.—At the annual dinner of the Hardwicke Society held at the Cafe Royal this year the Lord Chief Justice, in proposing the toast of 'Our Guests,' said that between the British nation and the great German nation there should be nothing but good feeling: When they met distinguished members of the German Empire, distinguished in science, in literature, in medicine, in philosophy and in law, they were always struck by the many bonds which existed between the two peoples, both being imbued with the desire for the cultivation of what was noble and what was good, and the rejection of all that was false and shoddy and tawdry. The German nation taught us thoroughness in everything that they did The judicial system which prevailed in Germany was different from our own. Forty years ago the condition of the administration of justice in Germany was in comparative chaos, but it had become a magnificent system. Under that system branches of the High Court existed in every locality. Some of the ardent reformers in this country thought that something of the kind might with advantage be done here, but he would simply say that he did not agree with them. He was told that there were in European Germany no fewer than 8,000 judges, and that there were in Prussia alone no fewer than 500 judges. He hoped there would be a very

large exodus of members of the English Bar, with their scanty earnings here, to go across and qualify for the post of judge, but he must warn them that they would have a very severe training to go through. It was an incident of the great German system that there was the same training for the judges and for the members of the Bar, and it was a training which, with several examinations and the taking of several degrees in law, occupied something like six or seven years. In Germany, as was the case in some other countries, such as France, men were trained to be judges from the time is when they started on their professional career, that was to say, when a man was qualified he elected either to be a solicitor and barrister combined, or to be a judge. He was told that, although at times judges were chosen from the Bar, it was very rare, perhaps once in ten years. In England, on the contrary, judges were chosen from the Bar. So that it would be seen at once that the two systems were poles apart. Although he hoped he would never live to see any change in our own mode of appointing judges, they must admire the thoroughness of the German system. There were certain incidents in connection with the judges in Germany which he thought we might, perhaps, copy with advantage here. He would only mention two. One was that the judges were only expected to work two days a week, and in some cases only one day a week. He wondered what the House of Commons would say if the judges announced that in future they were only going to work every other day. There was another most excellent practice which he really did commend to the English Bar, and that was that the judges might fine, and frequently did fine, a barrister for contempt. He was told that the fine was usually 5*l*., which went to the State. In some of the Courts of Appeal in Germany there were as many as 120 judges and 20 presidents. One could scarcely grasp the idea, and their German friends were astonished at the amount of work got through in this country by so small a number of judges. The guests from Germany were present to indicate the good feeling that they entertained for the English Bench and particularly for the English Bar. It had been his privilege during the past fifty years to know not a few distinguished German judges and distinguished German lawyers, and he had been struck by their learning, refinement, and broad-mindedness. Such gatherings as the present made one feel that men of the law who were working for the good of their respective countries in the highest branches of legal procedure ought to be friends and interchange ideas, and get, the one from the other, experience which would be valuable to them in the further prosecution of their work. He trusted

and believed that, day by day and year by year, the bonds of friendship between Great Britain and Germany would grow closer and closer.

Herr Heinroth, responding in German, said he wished to express his gratitude for having been permitted to be present at a sitting of the Court conducted by the Lord Chief justice. and to admire the noble presence and influence of that distinguished judge. The words which the Lord Chief Justice had been kind enough to say came, he felt, from the warm heart of a sincere colleague. England, the land of wisdom applied to practical life, gave Gneist the foundation of that monumental edifice, the Prussian law of droit administratif, under whose sheltering root their citizens enjoyed the same peaceful rule of law in their relations to the executive that was enjoyed in England, and they would never be able to forget that this inestimable treasure had come to them from the rich hoard of English legal traditions. A powerful movement in favour of a change in this procedure and the appointment of judges in accordance with the English model had existed for many years in Germany. This movement was the result of a keen anxiety for the welfare of what was the nation's noblest possession—he meant the administration of justice—and it had by no means ceased. But he did not hesitate to say publicly that he was one of its opponents. He loved and reverenced the legal system of his country, and believed it to be the equal of that of any other country. This much, however, he must admit, that in Germany they were overwhelmed by too elaborate a system of appeals, and in this respect the wise restraint observed by the English must be recognised as superior. While England had the advantage of them in this respect, he held, speaking for himself, that they had advanced a step ahead of England in fixing the rules of material law. The question whether or not the law should be codified had been settled ever since the days when the codification of the Prussian Civil Law was first taken in hand. The idea that it was advisable to form the rules of private law into the shape of paragraphs had since those days conquered the whole of Germany, and from the beginning of the present century all Germany had possessed one code of written, clearly defined private law. He ventured to proclaim his belief that even a fanatical admiration of a code had its advantages, and might in England have this particular effect, that the proverbial glorious uncertainty of the law would vanish for ever. There existed an inexorable law which obtained among the civilised nations of the law—the law which says '*inter arma silent legis.*' But that two nations closely connected by common ideals and material interests, closely connected by blood,

should start upon a law suit without any deep cause of quarrel and carry it to the rough arbitrament of the sword until both parties had shed their life blood—that he maintained was madness. Might it never happen that the laws were silenced between England and Germany. That was the fervent hope, the *opinio communis*, of all German lawyers, and he trusted that the same faith was held by their colleagues in this country.

Lord Shaw proposed the toast of "The Hardwicke Society,' to which Mr. du Parcq responded in a graceful and humorous speech.

Mr. T. M. Healy, K. C., M. P., gave the toast of 'The Bench,' to which Lord justice Vaughan Williams replied.

Lord de Villiers, who proposed the toast of 'The Bar,' to which Mr. Stewart-Smith, K. C., responded, said that if he were asked what qualities most distinguished the Bar of England he would say fearlessness, independence and integrity, and if he were asked what had most raised the Bar in England he would say the separation of the two branches of the profession. Under the present system advocates could always exercise a quasi-judicial capacity, and it was for this reason, he thought, that on their elevation to the Bench they became judges of the first quality.—*The Law Journal.*

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Judge and Counsel.—His Honour Judge Sir Sherston Baker, addressing a member of the Bar at the Grimsby County Court, on July 19, said: 'You were not here last time in a case in which counsel were engaged, but it lasted such great time that I made up my mind I will not take cases in which counsel are engaged until last. That is the result of the unreasonable length of time taken, not by you, but by other counsel at the last Court. There was a Member of Parliament in the last case, who talked and talked and talked, and with only one day to hear several cases it was unreasonable for anyone in possession of the Court to talk unduly or call unnecessary witnesses.'—*Ibid.*

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The County Courts Bill.—Lord Halsbury, on the report of amendments to the Bill, moved the omission of Clause 1. He said the Bill would entirely destroy the real purpose for which the County Courts were instituted, and would cause increased delay in the decision of that small class of cases with which County Courts were intended to deal. The County Courts were already too much crowded. By allowing appeals on questions of fact as well as of law in cases involving over 50*l.*, the Bill would tend to increase litigation.

Lord Gorell contended that the present position in the County Courts would be improved by the Bill, which had met with the approval of the various law societies in the country.

Lord Robson said that at present County Courts had full jurisdiction up to 100*l.*, and beyond 100*l.*, they had unlimited jurisdiction by consent. That consent was signified—and this was the crucial point in the Bill—by a mere letter. Under this Bill, instead of a defendant being asked for his consent, the plaintiff was permitted—he might say he was almost invited—to put his case down in the County Court. The defendant was not allowed to intimate his dissent by a letter. He was compelled under the Bill to go into the High Court and to make an application to have his case transferred It was a superfluous, expensive, and unnecessary interlocutory proceeding, exactly the kind of proceeding which law reformers were anxious to get rid of.

Lord Mersey agreed that Clause 1 was the only part of the Bill to which any real objection could be taken. It opened the doors of County Courts in all directions. Those courts were originally instituted, and were still intended, for a cheap, satisfactory, and speedy means of disposing of poor men's cases.

Lord Alverstone said no case had been made for taking King's Bench actions out of the King's Bench and sending them for trial to the County Court. If the circuit system was defective let it be altered, but the circuit system stood, and he did not see why a man in the north or the west should not have the advantage of a Judge of the High Court coming down to try his case at his own door.

The Lord Chancellor said the discussion, apart from the speech of Lord Gorell, showed once more how lawyers were against all law reform. The solicitors were in favour of the County Courts Bill. In fact, the only people against it were the Bar Council, but he thought none of these eminent lawyers would pretend to have any personal knowledge of the County Courts. It was said that business in these courts was congested. Some complaints in that respect had been made to him as Lord Chancellor, but they were very few. The average work done by County Court Judges was 153 days in a year—that was all. He had come across a County Court Judge who sat 170 days in the year and made a grievance of it. But no Judges except two in this country had ever complained to him of excessive work. Those two cases he investigated, and there was nothing in them. What was the real reason of this opposition? It was that the Bar had the sole audience in the High Court and no solicitor could plead. But in the County Courts the Bar were confronted with the competition

of solicitors. He should greatly regret if the putting of work into the County Courts had the result of injuring his own profession; but he knew it would not. There would be more work to do in the County Court, and the High Court would be left more free to do the real important business which was required of a court of greater authority. That was the bottom of this opposition. It was an interested professional opposition, and he felt it his duty to say so.

Lord Lansdowne said that in view of the great division of authority on this subject, he felt he should not be justified in giving his vote for a proposal which would impose new duties upon these already overburdened tribunals.

The House divided, and there voted: for the clause, 37; against, 21; majority for, 16.

Lord Gorell moved an amendment, which was accepted, inserting the condition 'if a solicitor' to Clause 20, which provides that at any place where there is a district registry of the High Court the district registrar shall be the registrar of the County Court, unless the Lord Chancellor, by reason of the amount of business to be transacted, otherwise directs.—*The Law Journal.*

NOTIFICATIONS.

Notification.—Order—No. 2437, Revenue, dated 8th August 1911.—Under the Limited Proprietors Act IV of 1911 a person other than the owner may be registered as the proprietor of an estate or of a portion of an estate for the purposes of the Madras Survey and Boundaries Act, 1897. In order to guard against the possibility of the interests of the owner being prejudiced by action of the registered proprietor taken under the last-named Act, the Government consider that provision should be made to ensure that the owner is given due notice of any proceedings likely to affect the boundaries of his property which may be initiated by a person so registered as proprietor under the Limited Proprietors Act IV of 1911. The following notification will be published in the *Fort St. George Gazette*:—

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Notification.—In exercise of the powers conferred by section 32 of the Madras Survey and Boundaries Act IV of 1897 as amended by Madras Act IV of 1900, His Excellency the Governor-in-Council has been pleased to prescribe the following rule which is hereby notified for general information:—

Under clause (g).—"Where any person other than the owner is " registered as proprietor of an estate or of a portion of an estate

" under the Madras Limited Proprietors Act, 1911, all communi-" cations and notices required to be made or given under sections 11, " 12 and 18 of the Madras Survey and Boundaries Act IV of 1897 " to the proprietor of such estate or portion of an estate shall be " made or given to the owner as well as to the person registered as " limited proprietor of each estate or portion of an estate."

BOOK REVIEWS.

Muhammadan Jurisprudence.—By MR. JUSTICE ABDUR RAHIM of the Madras High Court:—Published by the S.P.C.K. Press Vepery, Madras: Price Rs. 15—The late Sir *Bhashyam Iyengar* used to say that Muhammadan Law was more scientific than Hindu Law and that it was a real jurisprudence. The statement would only provoke a mild ripple of amusement amongst his friends, for the view is widely prevalent that Muhammadan Law is nothing but " an arbitrary collection of rules and dicta based on no intelligible data " and that the less we have anything to do with them the better. It is enough to refer to a very recent instance of the treatment generally accorded to Muhammadan Law. So late as March last, Mr. Justice *Beaman* of the Bombay High Court despaired of extracting "from the vast entanglement of Muhammadan Law anything like consistent principles, or intelligible classifications or accurately expressed notions" — *Casamally* v. *Sir Currimbhai Ebrahim* [1]. Hindu Law also shared at one time a similar fate. We have only to recall Abbé Dubois's account of it which can hardly be said to be flattering. Nor can we forget the remark of such a distinguished jurist as Sir Henry Maine, that Hindu Law calls assuredly for no eulogy. Various causes have been responsible for the imperfect appreciation of Muhammadan Law. Amongst them have to be reckoned the fact that the bulk of Indians were at no time under the real sway of Muhammadan private law, the want of familiarity with the original Arabic sources, the fact that the majority of the legal practitioners have been Hindus and Europeans, the limited extent to which Muhammadan Law applies, the probably less litigious spirit of the Muhammadans, the lack of anything like the continued impetus which Sanskrit and Hindu Law have had, and, above all, the absence of timely pioneers like Colebrooke and Mayne.

1. (1911) 13 Bom. L. R. at pp. 763, 764.

The appearance of Mr. Justice *Abdur Rahim's* "Muhammadan Jurisprudence" comes as a refreshing surprise to lawyers who have been accustomed to think somewhat lightly of Muhammadan Law. We have no doubt that it will establish once for all the claims of Muhammadan Law to be regarded as an advanced and serious jurisprudence, instead of its being regarded as a bundle of more or less fantastic rules evolved by a primitive community and incapable of further development. The careful analysis that has been accomplished by the learned author brings out vividly the fact that the Muhammadan system is rich in consistent principles, intelligible classifications and accurately expressed notions. The work is all the more needed on this side of India where the acquaintance with Muhammadan Law is perhaps of the slenderest. The moral value of the book is hardly less than its legal value. It will enable Hindu lawyers to understand and respect better some of the basic ideas of Muhammadan civilization which is certain to go some way towards bridging the steadily narrowing gulf between the two great Indian communities.

The task to which Mr. Justice *Abdur Rahim* has set himself is to fit the juristic conceptions and terminology of the Muhammadan lawyers of old to the framework of modern theoretic jurisprudence, and he has achieved a striking success. It is original in conception and admirable in execution. It must have cost the learned author much time and trouble, but it is apparent that it has been a labour of love. We can readily imagine the frequent and elaborate research, the constant verification and comparison, the distilling of propositions fit for modern use from archaic materials, the endless search for clues to the meaning of the ancient mind, that are involved in the pursuit of such studies as must have gone to the making of this book. The result is a work full of fine scholarship and of keen vision. We must permit ourselves to notice one feature of the book rather prominently. The most abstract and the most metaphysical ideas and the driest of legal details are expressed in a style which is as felicitous as it is accurate. And the two indispensable qualities of a sound style, "sanity and justesse," as Lord Morley would cal them, characterise it.

The nature of the subject must undoubtedly make the book a hard one to read, but no pains have been spared to make it lucid and interesting. The result is all the more brilliant when we remember, as we must, that "those ideas which seem to be the most simple are really the most difficult to grasp with certainty and express with accuracy." It is not too much to say that throughout the book there runs a note of quiet distinction and that an astonishing amount of erudition is worn, as it ought to be, lightly like a flower. The spirit in which the author has approached his task ensures the soundness of his conclusions. For he points out that "the Muhammadan system has been developed by jurists many of whom were not directly in touch with the practical needs and administration of justice. It must also be admitted that many of the rules of law enunciated by the jurists, whether based on a formal and literal interpretation of the texts or on analogy, are narrow and artificial." The benumbing effects of a constant admiration for ancient jurists when it is untempered by criticism which are sometimes visible in the study of Hindu Law are avoided. It is needless to state that it is a book on Muhammadan jurisprudence and not on Muhammadan law or upon the history of that law. It does not cover the same ground as other books already in the field. Practitioners as well as students are certain to derive considerable help. The details of the Muhammadan system will be much better understood with the assistance of such a guide. And we think the book is indispensable for a real grasp of the first principles of Muhammadan Law and for the understanding of its genius. For the way to study any system of law is certainly not to acquiesce in Dr. Johnson's half truth "Nay, Sir, they had more law long ago than they have now. As to precedents to be sure they will increase in course of time ; but the more precedents there are, the less occasion is there for law ; that is to say the less occasion is there for investigating principles."

Mr. Justice *Abdur Rahim* has avoided the banality of making his book a digest of case law and has overcome the difficulty of presenting his subject otherwise than as an unattractive skeleton. Almost every proposition has its full meaning drawn out by means of illustrations. And brief explanations of the reasons for the rules themselves are given where needed.

It is not possible within the short limits of this review to do justice to the contents of the book. At the threshold we find a very careful account of the fourfold sources of, Muhammadan law, *viz* :—Revelation as ascertained from the Qur'an and the traditionl sayings of the Prophet ; (2) the Consensus of Muhammadan jurists; (3) Juristic deduction, and (4) Custom. It would appear that the Muhammadan Law more than the Hindu law is bound up with religion in the sense that the whole is traced mediately or immediately to God but as according to Muhammadan jurists faith is founded upon reason and is not the pure result of revelation, the ultimate basis of the law is human reason. We are told that the imperishability of human life is one of the underlying postulates of Muhammadan Law. Not the least important part of the book is the elaborate exposition of the rules of interpretation laid down by Muhammadan jurists, almost all of which appear to stand to reason. The function of analogy would seem to be very wide as many rules of law must be deduced far beyond the letter of the texts. But Muhammadan lawyers appear to have laid down proper safeguards subject to which only a valid analogical deduction can be made. It was further corrected or supplemented by their notions of juristic equity. The two chapters on analogy and juristic equity form perhaps the most fascinating part of the book. The learned author compares Ijmah or the consensus of juristic opinion to the judge-made law of the English system and thinks it would be substantially correct to say that the Muhammadan jurisprudence concedes legislative powers to jurists acting in a body. We are however inclined to think that the true analogue of Ijmah is to be found in the *Responsa Prudentium* of Rome and not in the case—law of England. The Muhammadan system contains a fairly well-developed indigenous law of wills and trusts and appears to have the germs of an insolvency law. In these matters as in the law relating to succession it certainly appears that the Hindu law is inferior and is less developed than the Muhammadan system. As regards the topic of possessory title, there does not appear to be much difference between the Muhammadan lawyer's conception of it and the recognition accorded to it by the most advanced jurists of the West. We think that the Muhammadan conception of contract is more logical than the English lawyer's view of it.

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